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In The

Supreme Court of the United States

October Term, 1997

DARREL D. SMITH,

Petitioner,

v.

JOHN PETER LEE, LTD., TOM GRIMMETT,
Chapter 7 Trustee,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

K. JOHN SHAFFER*
STUTMAN, TREISTER & GLATT
Professional Corporation
3699 Wilshire Boulevard, Suite 900
Los Angeles, California 90010
(213) 251-5100

Counsel of Record

RICHARD MCKNIGHT
DAVID MINCIN
MCKNIGHT & HENDRIX, P.C.
330 South Third Street, Suite 900
Las Vegas, Nevada 89101
(702) 388-7185

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

83 pp

QUESTIONS PRESENTED

The commencement of a bankruptcy case results in the creation of an estate consisting of nearly all of the debtor's property as of that date. In turn, Bankruptcy Code section 1141(b)[1] provides that confirmation of a chapter 11 plan of reorganization "vests all of the property of the estate in the debtor," except as otherwise provided in the plan.

Bankruptcy Code section 1112(b) authorizes a bankruptcy court to convert a chapter 11 reorganization case to a liquidation under chapter 7, only if both (i) such conversion is "in the best interest of creditors and the estate" and (ii) there exists "cause" for the conversion.

The questions presented in this case are:

1. Whether the Ninth Circuit erred in holding that confirmation of a chapter 11 plan of reorganization did not terminate the bankruptcy estate and result in a revesting of the assets of the estate in the reorganized debtor, notwithstanding the plain language of Bankruptcy Code section 1141(b).

2. Whether the Ninth Circuit erred under Bankruptcy Code section 1112(b) in affirming the conversion of a chapter 11 bankruptcy case to one under chapter 7 more than two years after confirmation of a chapter 11 plan of reorganization, where the conversion could not be "in the best interests of . . . the estate" because the assets

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[1] All references herein to the "Bankruptcy Code" are to title 11 of the United States Code, 11 U.S.C. § ___.

QUESTIONS PRESENTED – Continued

of the chapter 11 estate had revested in the reorganized debtor and there was no remaining bankruptcy estate to vest in the chapter 7 trustee.

LIST OF INTERESTED PARTIES (SUPREME COURT RULES 14(b) AND 29.6)

Petitioner Darrel D. Smith is an individual. Respondent John Peter Lee, Ltd. is a law firm. Respondent Tom Grimmett is an individual and a party to this matter in his capacity as trustee of the purported chapter 7 estate of Darrel D. Smith.

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I.

OPINIONS BELOW

The Memorandum Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit (Browning, Pregerson, and Hawkins, JJ.) were entered on March 20, 1998. The Ninth Circuit's unpublished opinion is set forth in the appendix to this petition, p. 1a, *infra*. The Ninth Circuit denied a timely petition for rehearing on July 1, 1998. P. 8a, *infra*.

The Opinion of the United States District Court for the District of Nevada (Pro, J.), issued October 10, 1996, is reported at 201 B.R. 267 (D. Nev. 1996). The District Court's Opinion is set forth in the appendix to this petition, p. 9a, *infra*.

The Order to Convert Case to Chapter 7 of the United States Bankruptcy Court for the District of Nevada (Jones, B.J.), entered on February 6, 1996, has not been reported; it is set forth in the appendix, p. 25a, *infra*.

II.

JURISDICTION

The Bankruptcy Court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(b)(2)(E) and 1334(a). The District Court and Ninth Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 158(a) and 158(d), respectively. The jurisdiction of this Court to review the decision of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

III.

RELEVANT STATUTES

11 U.S.C. § 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an

estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) [A]ll legal or equitable interests of the debtor in property as of the commencement of the case. . . .

* * *

11 U.S.C. § 1112. Conversion or dismissal

* * *

(b) [O]n request of a party in interest or the United States trustee or bankruptcy administrator, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including

* * *

(7) inability to effectuate substantial consummation of a confirmed plan; [or]

(8) material default by the debtor with respect to a confirmed plan[.]

11 U.S.C. § 1141. Effect of confirmation

* * *

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) [E]xcept as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners of the debtor.

(d) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan

> . . . discharges the debtor from any debt that arose before the date of such confirmation. . . .

11 U.S.C. § 1142. Implementation of plan

> (a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.
>
> (b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

IV.

STATEMENT OF THE CASE

Petitioner Darrel D. Smith filed a petition for relief under chapter 11 of the Bankruptcy Code in 1991. The bankruptcy was the result of intensive, multi-state litigation that had overwhelmed Smith both physically and financially.

Upon the commencement of his chapter 11 case, Smith's assets became vested in his bankruptcy estate created under Bankruptcy Code section 541(a). Among the assets in Smith's bankruptcy estate were (i) various causes of action he held against third parties, and (ii) the painting *Daybreak*, which has been referred to as

"America's *Mona Lisa*" and is considered Maxfield Parrish's most famous and important work.[2]

Smith retained the law firm of Respondent John Peter Lee, Ltd. ("Lee") as counsel for his chapter 11 estate in accordance with Bankruptcy Code section 327. As Smith's bankruptcy counsel, the Lee firm was responsible for advising Smith as to the preparation of a plan of reorganization, and the firm was principally responsible for drafting the plan and an accompanying disclosure statement.

Smith confirmed his "Debtor's Third Plan of Reorganization" ("Plan") with the support of nearly all of his creditors on January 11, 1994. The Plan, which a member of the Lee firm drafted, provided that all creditors' claims would be paid in full within sixty months after confirmation, with interest at 8% per annum. P. 36a, *infra*. Other than the sixty-month deadline, the Plan did not set forth a schedule of when creditors would be paid. Rather, the Plan provided in three separate provisions that creditors were to be paid only "as funds are available" from the net proceeds, if any, derived from certain causes of action Smith was pursuing and from the sale of prints of *Daybreak*, after payment of a monthly living expense to Smith. Pp. 35a, 36a, 38a, *infra*. Respondent Lee and certain other creditors also were granted liens on *Daybreak* to secure their claims, principally consisting of attorneys' fees billed during Smith's chapter 11 case.

Nothing in the Plan *obligated* Smith to make prints of *Daybreak*. Rather, the Plan expressly required the proceeds from the prints to be paid to creditors only *"[i]f* prints of *Daybreak* are made." P. 39a, *infra* (emphasis added). According to the Plan, "[n]o projection concerning the costs or profit to the estate is possible at this time, but [Smith] will undertake all reasonable efforts to publish and market reproductions of the painting." Pp.

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[2] A reproduction of *Daybreak* is included in the Appendix at p. 42a, *infra*.

37a-38a, *infra*. The lead Lee attorney in Smith's case made clear at the confirmation hearing that "the possibility of making prints of the painting *Daybreak* . . . doesn't seem at this point to be a real strong possibility."[3] The Disclosure Statement accompanying the Plan contained similar disclaimers.

The Plan provided that only "[i]f, sixty (60) months after confirmation, creditors are not substantially paid, or if Debtor loses both litigations [he was pursuing] and there is insufficient profit from print[s] of *Daybreak* to pay all claims, the Debtor will arrange to sell or auction *Daybreak* to pay creditors. . . . " P. 39a, *infra*. In other words, the Plan did not require Smith to sell *Daybreak* until January, 1999, and then only if his creditors had not been paid in full.

Finally, nothing in the Plan purported to override the general provisions of Bankruptcy Code section 1141(b), which provides that "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." To the contrary, the Plan provided that the estate's assets "shall not be revested in Debtor" *only* if the confirmation order failed to become final. P. 41a, *infra*. Since the confirmation order did become final and unappealable, the estate's assets in fact did revest in Smith, and his former chapter 11 estate ceased to exist.

As noted, Smith's Plan received overwhelming support from his creditors and was confirmed with no material opposition. Respondent Lee fully advocated confirmation, acknowledging that under the Plan its attorneys drafted, Smith "would have basically sixty months . . . to pay creditors."[4] At that time, Lee was one of Smith's largest creditors on account of the more than

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[3] Transcript of Hearing on Confirmation of Chapter 11 Plan, *inter alia*, dated December 7, 1993 ("Confirmation Transcript"), at 5.

[4] Confirmation Transcript at 9.

$800,000 in attorneys' fees the firm billed during Smith's case.

Lee attorneys were directly involved in Smith's efforts to market prints of *Daybreak* in accordance with the Plan. The Lee attorneys' activities included, among other things, meeting with potential manufacturers of prints and arranging for the painting to go on a world-wide promotional tour.[5]

The relationship between the Lee firm and Smith soured in the months following confirmation. On March 31, 1995, the Lee firm moved to withdraw as Smith's attorney, contending that "the interests of this law firm have become adverse to [Smith's] interests."[6] The Lee firm also moved to convert Smith's chapter 11 case to one under chapter 7, and to force the sale of Smith's assets, including *Daybreak*. The Lee firm's principal motivations were (i) to obtain immediate payment of its chapter 11 fees, notwithstanding the firm's agreement just a few months earlier to defer collection of its fees in accordance with the Plan, and (ii) to prevent the foreign exhibition of *Daybreak*, notwithstanding the firm's direct participation in arranging the worldwide tour. Significantly, other than Smith's attorneys, *none* of Smith's other creditors sought conversion or otherwise objected to Smith's post-confirmation implementation of the Plan.

The Bankruptcy Court granted the Lee firm's motion to withdraw, but denied the motion to convert without prejudice. The Bankruptcy Court revisited the conversion issue during a subsequent status conference. At that conference, the Court required Smith to show "reasonable efforts to market and to produce prints" of *Daybreak* in order to prevent a possible conversion of his case. In response, Smith made over 200 inquiries to parties that

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[5] Confirmation Transcript at 5, 9-10.

[6] March 31, 1995 letter accompanying Motion to Withdraw as Counsel of Record for the Debtor/Plaintiff Darrel D. Smith.

might be interested in making *Daybreak* prints. Unfortunately, even Lee's own expert admitted that making prints of *Daybreak* was not feasible at that time, and that "the Debtor would be unable to realize any significant profit by publishing prints of *Daybreak*."[7] Moreover, because the Plan provided that any profits would go to pay Smith's living allowance first, it was highly unlikely that Smith's creditors would receive any benefit from the making of prints.

On January 23, 1996, the Bankruptcy Court granted Lee's motion to convert Smith's case to a chapter 7 liquidation. Contrary to its prior holding that Smith was required to make "reasonable efforts" to market *Daybreak*, the court held that "it was required that there would be a program of making and selling prints"; Smith's unsuccessful attempts to market the prints were not sufficient. Believing that a marketing program was "impractical at this time," and that it was the "best time" to sell *Daybreak*, the Bankruptcy Court found that Smith was in default under his Plan, and that he could not substantially consummate his Plan. The court granted Lee's motion under Bankruptcy Code sections 1112(b)(7) & (8) and ordered Smith's case converted to a chapter 7 liquidation. P. 25a, *infra*.

In denying Smith's motion for reconsideration, the Bankruptcy Court made clear that it rejected the holdings of various other courts, including *In re T.S.P. Industries*, 117 B.R. 375 (Bankr. N.D. Ill. 1990), that post-confirmation conversion generally is not appropriate when the chapter 11 estate's assets already have revested in the reorganized debtor. Pp. 29a-30a, *infra*. The court held that while "property of an estate does revest in the Debtor upon confirmation," when a chapter 11 case is converted

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[7] Movant's Supplemental Brief in Support of Motion to Convert Chapter 11 Case and to Require the Sale of Maxfield Parrish's "Daybreak" and Other Estate Assets, filed by Lee on January 12, 1996, at 9.

to a chapter 7 the revested property "does become property of an estate, a Chapter 7 estate." P. 30a, *infra*. The Bankruptcy Court further made clear that its decision "to reject *T.S.P. [Industries]*" was "a statement of law" that would have to be reviewed on appeal "de novo." *Id.*

Upon conversion, Respondent Tom Grimmett was appointed chapter 7 trustee. The Bankruptcy Court authorized Grimmett to sell *Daybreak* over Smith's objection, and the painting eventually was sold at auction for $3.9 million.

The District Court affirmed the conversion of Smith's case in a published decision. P. 9a, *infra*. As with the Bankruptcy Court, the District Court rejected *T.S.P. Industries* and held that post-confirmation conversion is appropriate even when the plan of reorganization has revested the former chapter 11 estate's assets in the reorganized debtor. Smith timely appealed to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit affirmed, but on different grounds from those cited by the lower courts. Contrary to the lower courts' holdings, the Ninth Circuit held that Smith's assets, including *Daybreak*, "did not vest in Smith free and clear of all claims and intervening interests upon confirmation." P. 4a, *infra*. Citing its prior decision in *Hillis Motors, Inc. v. Hawaii Auto. Dealers Ass'n (In re Hillis Motors, Inc.)*, 997 F.2d 581, 589 (9th Cir. 1993), the Ninth Circuit held that it could infer from certain provisions in Smith's Plan, including a reservation of Bankruptcy Court jurisdiction, that the estate property did not fully revest in Smith notwithstanding Bankruptcy Code section 1141(b). According to the Ninth Circuit, "[t]he [bankruptcy] court's broad and explicit retention of jurisdiction indicates that the plan, and thus the parties, did contemplate that the bankruptcy court would have continuing jurisdiction over *Daybreak*. Therefore, the bankruptcy

court had jurisdiction to convert Smith's assets into a Chapter 7 liquidation." P. 7a, *infra*.[8]

The conversion of Smith's case to a chapter 7 liquidation led to the trustee's sale of *Daybreak*, an irreplaceable asset, over Smith's objection and in contravention of the Plan's plain terms. Moreover, conversion substantially increased the administrative expenses in the case through the appointment of Respondent Grimmett as chapter 7 trustee. In addition to charging substantial trustee fees under Bankruptcy Code section 326(a), Grimmett has employed his own attorneys who, along with Lee, have continued to generate substantial attorneys' fees that Smith has been required to pay. The conversion also has cost Smith at least $300,000 in negative tax consequences which could have been avoided were Smith to have retained control over his assets. Finally, conversion has for more than two years tied up Smith's remaining assets in the unnecessary and expensive chapter 7 proceedings. Even though all of Smith's prepetition creditors have been paid in full, with interest, Grimmett continues to hold in the purported chapter 7 estate surplus cash to which Smith is entitled.

V.

REASONS FOR GRANTING THE WRIT

This case presents two important issues of bankruptcy law: (i) under what circumstances does estate property revest in a chapter 11 debtor who has confirmed a plan of reorganization, and (ii) whether property which has revested in a chapter 11 debtor upon plan confirmation thereafter may vest again in a new chapter 7 estate upon the post-confirmation conversion of the debtor's case.

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[8] The Ninth Circuit also affirmed the lower courts' holdings that Smith materially defaulted under the terms of his Plan, and that his Plan had not been "substantially consummated." Pp. 2a-4a, *infra*.

1. The Ninth Circuit erroneously held that Smith's assets did not revest in him upon confirmation of his Plan under Bankruptcy Code section 1141(b). This conclusion, which places the Ninth Circuit in conflict with decisions of other federal courts, including a published decision of the Eighth Circuit, was based upon three fundamental errors of law: (i) that the revesting of a chapter 11 estate's assets in the reorganized debtor under section 1141(b) can be overridden by implication, rather than only by express language in a plan, (ii) that a plan's retention of jurisdiction provisions can prevent the revesting of the estate's assets in the reorganized debtor, and (iii) that the grant to creditors of the right to receive the net proceeds generated from the estate's assets also can prevent the revesting of the estate's assets in the debtor.

2. Because the assets of Smith's chapter 11 estate did revest in him upon confirmation of his Plan, the Ninth Circuit was required to consider whether, upon conversion of Smith's case to a chapter 7 liquidation, Smith could be divested of those assets so that they would become part of a new chapter 7 estate. In this regard, the Ninth Circuit failed to follow the majority view – including that of the Sixth Circuit – that conversion of Smith's case to a chapter 7 liquidation could not have divested Smith of those assets which revested in him upon confirmation. Because most courts have recognized that conversion to chapter 7 following the revesting of a chapter 11 estate's assets in the reorganized debtor does not create a new chapter 7 estate, conversion under such circumstances serves no beneficial purpose and is not permitted under section 1112(b). Indeed, in the present case, conversion substantially increased the administrative expenses, delayed distribution of surplus cash, and divested Smith of the authority to manage his affairs that his creditors granted him under the Plan.

The Ninth Circuit's decision affirms a widely criticized published decision of the District Court below, conflicts with the holdings of a majority of cases to have considered these important issues, and is contrary to the

plain statutory language. This Court should grant certiorari in order to address the conflict among the courts and to correct the Ninth Circuit's erroneous and destructive decision.

A. This Court Should Grant Certiorari Because The Ninth Circuit's Holding That Smith's Chapter 11 Estate Did Not Revest In Him Upon Confirmation Conflicts With The Plain Statutory Language And The Holdings Of Virtually Every Other Court To Consider This Issue.

1. The Ninth Circuit Misapplied Bankruptcy Code Section 1141(b), Pursuant To Which Smith's Bankruptcy Estate Revested In Him Automatically Upon Confirmation.

Bankruptcy Code section 1141(b) embodies Congress' clear preference for the revesting of assets in reorganized debtors "so that they can continue in business, while paying creditors equitably from what funds are available." *In re De Laurentiis Entertainment Group*, 963 F.2d 1269, 1274 (9th Cir.), *cert. denied*, 505 U.S. 918 (1992); *see also Prince v. Clare*, 67 B.R. 270, 272 (N.D. Ill. 1986) ("The purpose of revesting the property in the debtor is to make the debtor in possession master of his own fate in the commercial world. . . . "). Accordingly, Congress drafted section 1141(b) to provide that property of debtors' estates "vests *automatically* upon plan confirmation" absent contrary provisions in the plan. *Harstad v. First American Bank*, 39 F.3d 898, 902 (8th Cir. 1994) (emphasis added). Plan "confirmation usually terminates the existence of the estate" and "customarily revests the property of the estate in the debtor"; a plan that provides otherwise is "atypical." *Hillis Motors*, 997 F.2d at 587, 589; *see also Security Bank v. Neiman*, 1 F.3d 687, 691 (8th Cir. 1993); *Department of Air Force v. Carolina Parachute Corp.*, 907 F.2d 1469, 1474 (4th Cir. 1990).

Contrary to the clear Congressional preference for revesting of estate assets in reorganized debtors, the Ninth Circuit held that "[t]he provisions of Smith's reorganization plan . . . limited the vesting provisions of section 1141(b)." The Ninth Circuit could not cite any provision in the Plan that expressly limited revesting in Smith, as no such provision existed. Rather, the Ninth Circuit inferred such a limitation based upon two entirely unrelated provisions of Smith's Plan – one that granted the Bankruptcy Court continuing jurisdiction to implement the Plan after confirmation, and one that gave Smith's creditors the right to receive the proceeds of the sale of prints of *Daybreak*, or from a sale of the painting itself if the creditors were not paid in full within sixty months. According to the Ninth Circuit, it was proper to infer a limitation on revesting in the reorganized debtor absent express language in the Plan to that effect because "[a] plan may prevent such vesting even if '[t]he plan does not state in unambiguous terms that the property of the estate does not revest in the debtor.' " P. 5a, *infra* (citing the Ninth Circuit's prior decision in *Hillis*, 997 F.2d at 589).

In addition to conflicting with the clear Congressional policy favoring revesting that underlies Bankruptcy Code section 1141(b), the Ninth Circuit's decision conflicts with the holdings of numerous courts with respect to three separate issues: (i) whether a plan may limit application of section 1141(b) by implication, (ii) whether the bankruptcy court's retention of post-confirmation jurisdiction over a plan's implementation overrides the revesting provisions of section 1141(b), and (iii) whether property from which creditors have continuing rights to receive proceeds under the plan remains estate property notwithstanding section 1141(b).

2. The Ninth Circuit's Decision Conflicts With Authority That A Plan Must Be Specific In Order To Override The Revesting Provisions In Section 1141(b).

Contrary to the Ninth Circuit, most courts to have considered the issue have held that a plan cannot implicitly limit revesting of a chapter 11 estate's assets in contravention of the general operation of Bankruptcy Code section 1141(b). Rather, in order to limit revesting in a debtor under section 1141(b), a plan must provide so *expressly*. *See, e.g., Prince v. Clare*, 67 B.R. at 272 (legal title revested in debtor because "[n]owhere in the Plan does it explicitly state" otherwise); *In re Pauling Auto Supply Inc.*, 158 B.R. 789, 795 (Bankr. N.D. Iowa 1993); *In re Grinstead*, 75 B.R. 2, 3 (Bankr. D. Minn. 1985). Thus, unlike the Ninth Circuit, which interpreted the Plan as limiting revesting even in the absence of any express provision to that effect, other courts have held that any ambiguities must be resolved in favor of the Congressional policy of revesting. "Absent an *express* provision postponing the revesting, the court will not imply it from vague and ambiguous provisions of the plan." *Pauling Auto Supply*, 158 B.R. at 795 (emphasis added). "Once a plan of reorganization is confirmed, the bankruptcy estate ceases to exist unless the plan *specifically* provides otherwise. . . . " *In re Grinstead*, 75 B.R. at 3 (emphasis added). *But see Hillis*, 997 F.2d at 589 (Ninth Circuit holding that "unambiguous terms" are *not* required to limit revesting in the reorganized debtor).

One of the most important issues in any bankruptcy case is how the estate's assets ultimately will be divided among the debtor and it creditors. Any confusion over the application of section 1141(b), however, may frustrate expectations as to the proper distribution of estate assets and undermine the clear Congressional policy in favor of revesting in the debtor. Accordingly, this Court should grant certiorari to resolve the conflict among the federal courts as to whether section 1141(b) authorizes a court to

infer a limitation on revesting from a plan's ambiguous or unrelated provisions.

3. The Ninth Circuit's Reliance Upon The Plan's Jurisdictional Provisions To Conclude That Smith's Assets Remained Part Of His Estate Conflicts With The Plain Statutory Language, The Holdings Of Other Courts, And Common Sense.

The Ninth Circuit held that Smith's Plan limited the revesting of his assets under section 1141(b) because the Plan contained a provision authorizing the Bankruptcy Court to "supervis[e] the enforcement of the plan." P. 6a, *infra*. The Ninth Circuit concluded that, in order for the Bankruptcy Court to retain jurisdiction necessary to enforce the plan, the assets of Smith's chapter 11 estate must not have fully revested in him upon confirmation.

In holding that the Plan's jurisdictional provisions affected the revesting of the property in Smith's estate under Bankruptcy Code section 1141(b), the Ninth Circuit nonsensically equated jurisdiction with property of the estate. This holding conflicts with the plain statutory language governing bankruptcy court jurisdiction, as well as with the holdings of numerous other courts.

a. The Plain Statutory Language Does Not Require That Property Remain Property Of The Debtor's Estate In Order For The Bankruptcy Court To Enforce The Provisions Of A Plan Of Reorganization.

The relevant jurisdictional statute in this case is Judicial Code section 1334, 28 U.S.C. § 1334, which generally governs bankruptcy court jurisdiction. Although section 1334(e) grants the bankruptcy courts (as annexes of the district courts) *exclusive* jurisdiction over all "property of the estate," it also grants exclusive jurisdiction over "all property, wherever located, of the debtor as of the commencement of [the bankruptcy] case," regardless of

whether such property is property of the estate. Moreover, section 1334(b) grants the district courts *nonexclusive* jurisdiction over "all civil proceedings arising under [the Bankruptcy Code], or arising in or related to cases under [the Bankruptcy Code]." Thus, under the plain language of both section 1334(e) and, in particular, section 1334(b), it is not necessary that assets remain property of a chapter 11 bankruptcy estate in order to be subject to the bankruptcy court's post-confirmation jurisdiction; the bankruptcy court has jurisdiction so long as the matter arises under the Bankruptcy Code or is related to the bankruptcy case, regardless of whether the property in question remains "property of the estate."

Moreover, the Ninth Circuit's conclusion that Smith's assets must have remained in his estate in order for the Bankruptcy Court to have authority to enforce the Plan completely ignores the effect of other Bankruptcy Code provisions specifically intended to deal with plan enforcement. In particular, Bankruptcy Code section 1142(b) provides:

> The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, *and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.*

11 U.S.C. § 1142(b) (emphasis added).

Unlike the Ninth Circuit, other courts have recognized that section 1142(b) is the appropriate means to enforce a confirmed plan, *see In re A.H. Robbins Co.*, 182 B.R. 128, 133 (Bankr. E.D. Va. 1995), *aff'd*, 86 F.3d 364 (4th Cir.), *cert. denied*, 117 S. Ct. 483 (1996), even when all property of the former chapter 11 estate has revested in the reorganized debtor, *see Goodman v. Phillip R. Curtis Enters.*, 809 F.2d 228, 232-33 (4th Cir. 1987) (court has jurisdiction under section 1142(b) to modify plan to include administration of assets "not included at all in an originally confirmed plan"). Thus, for example, under

section 1142(b) the Bankruptcy Court might have ordered the sale of *Daybreak*, but only if appropriate to consummate the Plan, without the substantial administrative costs, delay, and uncertainty caused by converting the case to a chapter 7. *See Riverside Nursing Home v. Northern Metropolitan Residential Health Care Facility, Inc.*, 977 F.2d 78, 81 (2d Cir. 1992) (affirming order entered pursuant to Bankruptcy Code section 1142 directing reorganized debtor to sign receivership sale agreement in accordance with plan).[9]

In disregard of the plain statutory language, the Ninth Circuit improperly concluded that bankruptcy court jurisdiction requires that the chapter 11 debtor's assets remain property of the bankruptcy estate so long as jurisdiction continues. This Court should grant certiorari in order to reverse the Ninth Circuit's erroneous statutory interpretation.

b. The Ninth Circuit's Equation Of Jurisdiction With Property Of The Estate Conflicts With Holdings Of The Eighth Circuit And Other Federal Courts.

The Ninth Circuit's equation of jurisdiction with property of the estate also conflicts with the holding of the Eighth Circuit in *Harstad*, 39 F.3d at 903, as well as the holdings of numerous lower courts which have recognized that, given the plain statutory language, bankruptcy court jurisdiction simply is not dependent upon whether property remains property of a bankruptcy estate. *See Eubanks v. Esenjay Petroleum Corp.*, 152 B.R. 459,

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[9] Similarly, since the Bankruptcy Court concluded that the Plan had not been substantially consummated, the Plan could have been modified to address the court's concerns under Bankruptcy Code section 1127(b), which provides, *inter alia*, "[t]he proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan. . . ."

463 (E.D. La. 1993); *Carter v. Peoples Bank & Trust Co. (In re BNW, Inc.)*, 201 B.R. 838, 849-50 (Bankr. S.D. Ala. 1996) (retention of jurisdiction provisions in plan do not override effect of section 1141(b)); *In re Roy Gooden Plumbing & Sewer Co.*, 156 B.R. 635, 637 (Bankr. E.D. Mo. 1993) ("The Chapter 11 bankruptcy estate does not exist after confirmation . . . even though the Bankruptcy Court retains jurisdiction in the matter."); *Travelers Indemnity Co. v. Chernicky Coal Co.*, 67 B.R. 828, 831 (Bankr. W.D. Pa. 1986) ("the operation of § 1141 does not, by itself, close the case or otherwise divest the court of jurisdiction"); *In re Westholt Manufacturing*, 20 B.R. 368, 372 (Bankr. D. Kan. 1982) ("At confirmation, all the property of the estate is vested in the debtor, thereby terminating the estate's existence, although the court has continued jurisdiction under section 1142 to oversee the plan's execution.") (footnote omitted), *aff'd sub nom., United States v. Redmond*, 36 B.R. 932 (D. Kan. 1984).

Although "the debtor's 'estate' ceases to exist once a plan of reorganization is confirmed," the "bankruptcy court's jurisdiction, which is derivative of the jurisdictional grant in Judicial Code sections 1334(a) and (b), continues post-confirmation 'to protect its [confirmation] decree, to prevent interference with the execution of the plan and to aid otherwise in its operation.' " *Eubanks*, 152 B.R. at 463 (quoting *In re Dilbert's Quality Supermarkets, Inc.*, 368 F.2d 922, 924 (2d Cir. 1966)). Thus, while the continued characterization of an asset as estate property post-confirmation may enhance the bankruptcy court's jurisdiction over that asset, the converse is not true – the fact that a bankruptcy court retains post-confirmation jurisdiction over an asset does not convert that asset into estate property or prevent its revesting in the debtor.

In *Harstad*, the Eighth Circuit rejected the Ninth Circuit's reasoning that a plan's jurisdictional provisions could, in the absence of more express provisions, negate the revesting of the debtor's assets under section 1141. In that case, the reorganized debtors sought to pursue bankruptcy avoidance causes of action after confirmation of

their chapter 11 plan. The Eighth Circuit held that the debtors could not pursue avoidance actions, because such actions generally may be brought only for the benefit of the bankruptcy estate. *See* 39 F.3d at 903. Citing section 1141(b), *Harstad* held that the debtors' estate terminated upon confirmation of their plan because estate property "vests in the debtors automatically upon plan confirmation." *Id.* at 902. Thus, because the debtors' estate had terminated, prosecution of the avoidance actions could not possibly have benefited the estate.

The Eighth Circuit rejected the debtors' reliance on a broad jurisdictional reservation in their plan that was similar to the jurisdictional provision in Smith's Plan. Among other things, the *Harstad* plan provided that the bankruptcy court would retain jurisdiction over (i) "determination of all questions and disputes regarding title to the assets of the estate," (ii) "interpretation and enforcement of the terms of this Plan," and (iii) "entry of any order, including any injunction, necessary to enforce the title, rights and powers of Debtors."[10] The *Harstad* plan further provided that the bankruptcy court "may exercise its jurisdiction . . . as the Court determines to be appropriate."[11] Notwithstanding the existence of this broad jurisdictional grant, the court held that property in the debtors' estate revested in the debtors upon confirmation. Applying section 1141(b), the Eighth Circuit held "[w]e conclude there is no post-confirmation bankruptcy estate. . . . " 39 F.3d at 904.

Similarly, the court in *BNW* considered in the context of a post-confirmation conversion the question whether a plan's provisions allowing the bankruptcy court to retain jurisdiction over the debtor's property had prevented that property from revesting in the reorganized debtor.

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[10] The affirmed bankruptcy court decision quotes the entire jurisdictional reservation. *See* 155 B.R. 500, 503 (Bankr. D. Minn. 1993).

[11] *See* 155 B.R. at 503.

After reviewing the revesting provisions in the plan, the court held that "[t]he language in the Plan and the confirmation order about retention of jurisdiction by the bankruptcy court does not change this result." 201 B.R. at 849-50 (citing *Zerand-Bernal Group v. Cox*, 23 F.3d 159, 164 (7th Cir. 1994), which holds that a bankruptcy court cannot use a plan's reservation of jurisdiction provisions to "write its own jurisdictional ticket"). Thus, regardless of the plan's jurisdictional provisions, conversion of the debtor's "confirmed Chapter 11 case accomplishe[d] little or nothing because there no longer was any property in the debtor's former estate for a chapter 7 trustee to administer." *Id.* at 848.

4. The Fact That Creditors May Retain An Interest In The Debtor's Property Does Not Limit The Revesting Of That Property Under Bankruptcy Code Section 1141(b).

Reorganization plans routinely provide for the payment of creditors over time from assets that formerly belonged to the debtor's bankruptcy estate. *See, e.g.*, 11 U.S.C. § 1129(b)(2)(A) (plan may be fair and equitable if creditors retain their liens on the debtor's property and receive "deferred cash payments totaling at least the allowed amount" of their claims). The fact that property which was in the estate pre-confirmation is being used post-confirmation to fund a plan, however, does not mean that such property remains estate property post-confirmation. "[B]y virtue of § 1141 of the Bankruptcy Code, there is no longer an estate but merely a reorganized debtor even though the confirmed plan calls for a total liquidation of the assets." *In re Centurion Health, Inc.*, 177 B.R. 371, 373 (Bankr. N.D. Fla. 1994); *see In re Penrod*, 169 B.R. 910, 919 (Bankr. N.D. Ind. 1994) (upon confirmation, the estate ceases to exist and all estate property vests in the debtor, even though it is *"subject to the terms and conditions imposed by the plan"*) (emphasis in original), *aff'd*, 50 F.3d 459 (7th Cir. 1995).

By holding that property of a chapter 11 estate does not revest in the reorganized debtor when creditors retain interests in that property, the Ninth Circuit ignores the relationship between section 1141(b), which governs revesting, and section 1141(c), which governs encumbrances that remain on revested property post-confirmation. Section 1141(c) provides, in relevant part:

> [E]xcept as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

Unlike the Ninth Circuit, other courts have recognized the distinction between *revesting* property in the debtor under section 1141(b), and *encumbering* property with creditors' liens under section 1141(c). These courts have correctly held that estate property may revest under section 1141(b), even if the property remains subject to creditors' liens and claims under section 1141(c). *See, e.g., Pako Corp. v. Citytrust*, 109 B.R. 368, 376 (D. Minn. 1989) (cause of action revested in the reorganized debtor pursuant to section 1141(b), even though it may be subject to creditors' interests under section 1141(c)); *Relihan v. Exchange Bank*, 69 B.R. 122, 127 (S.D. Ga. 1985); *In re Water Gap Village*, 99 B.R. 226, 229-30 (Bankr. D.N.J. 1989) (property revests in debtor under section 1141(b) notwithstanding fact that debtor is "bound by its payment obligations under the Plan"). By holding that the Plan's provisions giving creditors the right to receive net proceeds from prints of *Daybreak* prevented ownership of *Daybreak* from revesting in Smith, the Ninth Circuit is in conflict with other courts that have correctly interpreted the statutory scheme.

B. This Court Should Grant Certiorari To Resolve The Conflicting Authority As To Whether Conversion To Chapter 7 After Confirmation Of A Plan Vests The Reorganized Debtor's Assets In A New Chapter 7 Estate.

1. The Ninth Circuit Failed To Apply The Majority View That Post-Confirmation Conversion To Chapter 7 Does Not Result In The Vesting Of Assets In A New Bankruptcy Estate.

In affirming the Bankruptcy Court's order converting Smith's case to one under chapter 7, the District Court (whose opinion the Ninth Circuit affirmed) held that conversion results in the creation of a new chapter 7 bankruptcy estate, the contents of which were the assets that had revested in Smith upon confirmation of his Plan (including *Daybreak*).

The holding that conversion created a new bankruptcy estate conflicts with published holdings of both the Sixth Circuit and of numerous lower courts. These conflicting authorities hold that, unless a plan of reorganization expressly provides to the contrary, the post-confirmation conversion of a case to chapter 7 cannot create a new estate and divest the reorganized debtor of its assets. *See In re Chattanooga Wholesale Antiques, Inc.*, 930 F.2d 458, 464 (6th Cir. 1991) ("Where property revests in the debtor, the binding effect of the confirmation order as provided in § 1141(a) would be rendered meaningless if a trustee could recapture payments made pursuant to the [confirmation] order"); *In re K & M Printing, Inc.*, 210 B.R. 583, 585 (Bankr. D. Ariz. 1997) ("Once property has vested in the debtor, conversion does not revest that property into a Chapter 7 estate."); *BNW*, 201 B.R. at 848-49; *In re Brown*, 178 B.R. 722, 727 (Bankr. E.D. Tenn. 1995) ("courts recognize the principle that the revesting of estate property in the debtor means that the property cannot pass into a Chapter 7 estate on conversion unless the plan so provides"); *In re Winom Tool & Die, Inc.*, 173 B.R. 613, 619

(Bankr. E.D. Mich. 1994) (revested property "does not reenter the chapter 7 estate in the event of conversion"); *In re T.S.P. Industries*, 117 B.R. at 377-79. This rule is applied with particular force when, as was the case here, confirmation occurred long before conversion. *See Ohio v. H.R.P. Auto Center, Inc. (In re H.R.P. Auto Center, Inc.)*, 130 B.R. 247, 257 (Bankr. N.D. Ohio 1991) ("Post-confirmation conversion of an entity which has operated any extent of time under a confirmed plan would result in administrative problems and would consume resources that could otherwise benefit creditors.").

In *Chattanooga Wholesale*, the Sixth Circuit considered whether Bankruptcy Code section 549(a) authorized a chapter 7 trustee appointed after a post-confirmation conversion of a chapter 11 case to avoid and recover payments made by the reorganized debtor. Section 549(a) generally empowers a trustee to avoid unauthorized "transfer[s] of property of the estate." Although the post-confirmation conversion to chapter 7 was not itself challenged, the recipient of the payments opposed the trustee's avoidance action on the grounds that, upon confirmation, the estate ceased to exist and, therefore, any post-confirmation payments made by the reorganized debtor could not be transfers of estate property.

In concluding that the trustee lacked authority to challenge the post-confirmation payments under section 549(a), the Sixth Circuit held that, under section 1141(b), "the property of the estate had been revested in the debtor . . . and was no longer property of the estate." 930 F.2d at 462 (quotation omitted). Because there was no property of the estate after confirmation, there could be no avoidable "transfer of property of the estate" under section 549(a). The Sixth Circuit made clear that "[s]ince all of the debtor's property revested it is clear that the trustee may not avoid any transfers which occurred after confirmation of the debtor's plan." *Id.* (quotation omitted).

The majority rule that post-confirmation conversion to chapter 7 does not divest the reorganized debtor of its

ownership of the assets that were revested under the plan is based upon the plain language of Bankruptcy Code sections 348(a) and 541(a). Section 348(a) provides that "[c]onversion of a case from a case under one chapter of [the Bankruptcy Code] to a case under another chapter of [the Bankruptcy Code] . . . does not effect a change in the date of the filing of the petition." Because the bankruptcy "estate is created at the commencement of a case [under section 541(a)] and the date of the commencement . . . is not changed by conversion" under section 348(a), "a new estate is not created at the time of conversion." *T.S.P. Industries*, 117 B.R. at 378; *see also K & M Printing*, 210 B.R. at 584-85.

The majority rule also advances the important Congressional policy of ensuring the finality of confirmed plans. *See In re Orange Tree Assocs.*, 961 F.2d 1445, 1447 (9th Cir. 1992) ("There is a compelling reason for finality of reorganization plans."); *Chattanooga Wholesale*, 930 F.2d at 463 (recognizing need for "finality to confirmed plans"). "The strong public policy in favor of maximizing debtors' estates and facilitating successful reorganization, reflected in the Code itself, clearly weighs in favor of encouraging . . . reliance by investors and others on the finality of bankruptcy confirmation orders." *In re Continental Airlines*, 91 F.3d 553, 565 (3d Cir. 1996) (en banc), *cert. denied*, 117 S. Ct. 686 (1997). In light of the strong policy in favor of finality, "courts have had no difficulty in recognizing that conversion does nothing to recapture the property." *Brown*, 178 B.R. at 727; *see also Vogel v. Russell Transfer, Inc.*, 852 F.2d 797, 799 (4th Cir. 1988) ("A conversion to Chapter 7 does not undo what was by court order achieved by the Chapter 11 confirmation. . . . ").[12]

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[12] The decision below also creates significant tension with courts that have interpreted analogous provisions in section 1141(d), which governs the debtor's discharge upon confirmation of a chapter 11 plan. Just as the majority view is that post-confirmation conversion of a chapter 11 case to a

Notwithstanding the plain statutory language and strong policy supporting the majority view, a minority of courts (including the courts below in this case) have held that post-confirmation conversion may cause a new chapter 7 estate to arise, even when all of the estate's assets have previously revested in the debtor. *See, e.g., In re Calania*, 188 B.R. 41 (Bankr. M.D. Fla. 1995); 4 *Norton Bankruptcy Law & Practice* § 95:12 at Supplement 172-73 (1998) (hereinafter "*Norton*") (discussing conflicts among the courts). For example, in *Calania*, the court considered whether a chapter 7 trustee could open the post-conversion mail of the reorganized debtor. The court noted that "it would be utterly pointless to make a provision for the conversion of an aborted Chapter 11 case to a Chapter 7 case if by virtue of Section 1141 there would not be any assets for the Chapter 7 trustee to administer." *Id.* at 43. Instead, the court concluded "that properties which were subject to the confirmed plan . . . will be properties of the estate in a Chapter 7 case," regardless of whether they previously revested in the reorganized debtor in accordance with section 1141(b). *Id.* In rejecting the majority view, the District Court below held that "this Court finds the rationale of cases such as [*Calania*] persuasive." P. 23a, *infra*.

Both courts and commentators have expressly recognized the conflict of authority as to whether post-confirmation conversion causes a revesting of assets into a new chapter 7 estate. In fact, even the District Court below acknowledged that "courts have split as to this

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chapter 7 does not undo the revesting of assets in the reorganized debtor under section 1141(b), the majority view adopted by at least two Courts of Appeal is that conversion does not affect the debtor's discharge under section 1141(d). *See Laing v. A.G. Johnson (In re Laing)*, 31 F.3d 1050, 1051 (10th Cir. 1994) ("order confirming Chapter 11 plan precluded creditor's claim of nondischargeability in Chapter 7 case to which Chapter 11 was converted"); *Bank of Louisiana v. Pavlovich (In re Pavlovich)*, 952 F.2d 114, 118 (5th Cir. 1992) (same).

particular issue." 201 B.R. at 273. Similarly, in *K & M Printing*, the court recognized *Calania* and the District Court's published decision in this case (which the Ninth Circuit affirmed) as rejecting the majority view. 210 B.R. at 585. After considering the conflicting authorities, the *K & M Printing* court rejected the holding of the courts below and held "[r]espectfully, this Court concludes the [majority] view is better reasoned." *Id.* According to the court:

> What *Smith* doesn't analyze is the fact [that the] debtor is discharged and the rights of debtor and creditor [are] altered by the confirmed plan. The plan is binding and *res judicata*. . . . It may not be in the best interest of creditors and the estate to convert a case without assets to administer. . . . The argument [in *Smith*] that *T.S.P. Industries* purports to grant courts power to nullify revesting of estate property in the debtor by explicitly retaining jurisdiction over a plan, *In re Smith*, 201 B.R. at 273, ignores Section 1141(b). . . .
>
> The present plan provides that upon confirmation all property vests in debtor. . . . There is no provision directing that upon conversion, the Court retains jurisdiction over debtor's property. Accordingly, there is no estate property to administer and conversion is in no party's interest.

210 B.R. at 585-86.

Commentators on bankruptcy similarly have recognized the conflict in the law on this issue and the problems it has caused to both courts and litigants. *See Norton, supra*; Hon. Jack Caddell, *Post-Confirmation Conversion of Chapter 11 Cases and Other Post-Confirmation Issues*, Norton Bankr. Law Advisor (Aug. 1997) (Bankruptcy Judge concluding that "[t]here is . . . no statutory basis nor need to create a new bankruptcy estate from the ashes of an old bankruptcy that has been concluded by confirmation"); Gates, *Conversion of the Post-Confirmation Chapter*

11 Case: Selected Problems, Needed Reform, and Proposed Amendments, 6 J. Bankr. L. & Prac. 3 (Mar. – Apr. 1997); Orlik, *Conversion After Chapter 11 Plan Confirmation, What Is It Good For? – Absolutely Nothing*, 23 Cal. Bankr. J. 91 (1996).

One leading treatise has noted "[t]he enormous confusion engendered by converting the post confirmation chapter 11 [case] to [a] chapter 7," and has described "[t]he effect of post confirmation conversion on various types of claims of creditors [as] mindboggling," resulting in "various reactions by the courts." *Norton* § 95:12 at Supplement 172-73 (1998). *Norton* continues:

> The failure of the Bankruptcy Code to deal effectively with post confirmation default has led to increasing confusion in the case law. . . . In larger cases . . . , either the reorganized debtor or some creditor often decides that return to the bankruptcy court for liquidation is called for. Their immediate reaction is to convert the original case from Chapter 11 to Chapter 7. *This course is fraught with confusion and unintended consequences and is inappropriate unless the conversion occurs very shortly after confirmation and before the bulk of the property of the debtor in possession is transferred.*

Id. (emphasis added).

2. The Ninth Circuit Failed To Recognize That Post-Confirmation Conversion Is Not Appropriate When It Will Not Result In The Creation Of A New Chapter 7 Estate.

The clear weight of authority is that post-confirmation conversion is not appropriate when no chapter 7 estate can be formed. *See, e.g., K & M Printing*, 210 B.R. at 585-86; *H.R.P. Auto Center*, 130 B.R. at 257; *T.S.P. Industries*, 117 B.R. at 376; *In re Burner Services & Combustion Control Co.*, 1992 U.S. Dist. LEXIS 12259 (D. Minn. 1992) ("conversion was not appropriate because there was no

estate left to administer"). The rationale of this authority is that section 1112(b) requires a showing that conversion would be in the best interest of *both* creditors *and* the estate. There can be no benefit "to the estate" from conversion to chapter 7, however, if all of the estate's assets have been revested in the reorganized debtor. Moreover, post-confirmation conversion of an entity which has operated [for] any extent of time under a confirmed plan would consume resources that could otherwise benefit creditors." *H.R.P. Auto Center*, 130 B.R. at 257. Thus, when as in this case the reorganized debtor has managed its former estate assets for more than two years, "post-confirmation conversion is not in the best interest of creditors." *T.S.P. Industries*, 117 B.R. at 376.[13]

By contrast, a number of courts (including the courts below in this case) have approved conversion without regard to whether the estate's assets have revested in the debtor. *See, e.g., In re Mobile Freezers, Inc.*, 146 B.R. 1000 (S.D. Ala. 1992), *aff'd without op.*, 14 F.3d 57 (11th Cir.),

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[13] Consistent with these holdings, other courts have allowed conversion only when there remain at least some assets in the debtor's estate, but the chapter 7 estate created by conversion is limited only to "the assets, if any, whether tangible or intangible, remaining in the debtors' pre-confirmation estates." *In re T.S. Note Co.*, 140 B.R. 812, 813 (Bankr. D. Kan. 1992); *see also K & M Printing*, 210 B.R. at 585-86 (denying motion to convert, but recognizing that conversion may be appropriate in those cases where estate assets remain to be administered); *BNW*, 201 B.R. at 848-49 (holding that "conversion of a confirmed Chapter 11 case accomplishes little or nothing" when the assets have revested in the reorganized debtor); *Pauling Auto Supply*, 158 B.R. at 795 (recognizing that "[a] great disadvantage of post-confirmation conversions may be that there is no estate subject to distribution by the chapter 7 trustee," but noting that no party had raised the issue in that case); *In re NTG Indus.*, 118 B.R. 606, 612 (Bankr. N.D. Ill. 1990) (upon post-confirmation conversion, right to pursue avoidance recoveries may vest in the chapter 7 estate, but only to the extent such rights remained in the chapter 11 estate).

cert. denied, 513 U.S. 807 (1994); *see also In re Robbins*, 167 B.R. 724, 727 (Bankr. D. Mass. 1994) (recognizing in *dicta* that when "the plan has been confirmed, the claimant can request conversion for a material default by the debtor" notwithstanding the fact that "the [debtor's] estate no longer exists"). As one leading commentator has noted:

> Property that is transferred to the reorganized debtor after confirmation is not property of the estate. Thus, upon conversion after substantial consummation, there is little, if any, property of the estate in the case that is being converted. Although at least one court has refused to convert a case on this basis, *other courts [such as the Ninth Circuit in this case] have ignored this problem, converted the case, and treated the property as if it were property of the estate within their jurisdiction.*

Norton, § 95:12 at 95-24 (emphasis added and footnote omitted).

By affirming the conversion of Smith's case notwithstanding the revesting of his assets upon confirmation of his Plan, the Ninth Circuit has perpetuated the conflict among the courts on this important issue of bankruptcy law. This Court should grant certiorari to resolve this conflict.

C. The Ninth Circuit Erred In Holding That Conversion Was Necessary To Enable Creditors And The Court To Enforce The Plan.

Contrary to the Ninth Circuit's erroneous belief, the fact that property revested in the reorganized debtor may not transfer to a chapter 7 estate does not leave creditors or the court without means to ensure the plan's enforcement. It is well established that the obligations arising under a confirmed plan may be enforced in *both* bankruptcy and nonbankruptcy forums, since a plan is effectively nothing more than a contract between the debtor and its creditors. *See Hillis*, 997 F.2d at 588; *Paul v. Monts*,

906 F.2d 1468, 1476-77 (10th Cir. 1990). Accordingly, "postpetition retention of jurisdiction by the bankruptcy court is not exclusive with respect to the default of a debtor under a confirmed plan or the remedies available to the creditor." *Paul*, 906 F.2d at 1476 (*citing In re Ernst*, 45 B.R. 700, 703 (Bankr. D. Minn. 1985)); *see also* 11 U.S.C. § 1142 (bankruptcy court may enforce plan's terms). As one court recognized in criticizing the decisions below, "[w]hat *Smith* doesn't analyze is the fact . . . [p]arties may seek enforcement of plan rights in nonbankruptcy forums." *K & M Printing*, 210 B.R. at 585.

Moreover, as many courts have recognized, ultimately "[i]t is up to the creditor to negotiate, pre-confirmation, the post-confirmation . . . restrictions that will be effectuated in the confirmed plan." *Penrod*, 169 B.R. at 919. In this case, Smith's Plan did not promise distributions on any particular date, and in fact expressly contemplated the passage of significant time before distributions might be made. Among other things, the Plan provided no less than three times that creditors would be paid only "as funds are available." P. 4, *supra*. The Disclosure Statement accompanying the Plan made similar disclosures. Both the Plan and the Disclosure Statement made clear that only "[i]f, sixty (60) months after confirmation, secured creditors have not been substantially paid, Debtor will make arrangements to sell or auction the painting *Daybreak*." P. 36a, *infra*; *see also* p. 39a, *infra*. During this period, interest accrued on creditors' claims at 8%. P. 36a, *infra*.

Smith's Plan received overwhelming support from his creditors (including Respondent Lee) and was confirmed with no material opposition. The creditor principally behind the conversion of Smith's case, Lee, was Smith's former law firm which had drafted the Plan. If Smith's former attorneys desired to impose additional enforcement remedies in the Plan (including even the power to vest assets in a chapter 7 trustee), they had every opportunity to do so. *See In re Iberis International, Inc.*, 72 B.R. 624, 626 (Bankr. W.D. Wis. 1986) (plan may

expressly provide that debtor's case would be converted to chapter 7 upon default under the plan); *In re Silver Mill Frozen Foods, Inc.*, 23 B.R. 179 (Bankr. W.D. Mich. 1982) (same).

VI.

CONCLUSION

The Ninth Circuit's decision is at odds with the decisions of other courts, the plain language of the Bankruptcy Code, and sound policy regarding the finality of confirmed plans. This Court should grant the petition for a writ of certiorari in order to restore uniformity to the law and to forward Congress' intent of favoring finality of confirmation orders and of allowing reorganized debtors to administer their assets following the successful confirmation of a chapter 11 plan of reorganization.

Respectfully submitted,

K. JOHN SHAFFER*
STUTMAN, TREISTER & GLATT
PROFESSIONAL CORPORATION
3699 Wilshire Boulevard, Suite 900
Los Angeles, California 90010
(213) 251-5100

RICHARD MCKNIGHT
DAVID MINCIN
MCKNIGHT & HENDRIX, P.C.
330 South Third Street, Suite 900
Las Vegas, Nevada 89101
(702) 388-7185

Counsel for Petitioner
**Counsel of Record*

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re:	)	No. 96-17214
DARREL[ ] D. SMITH,	)	
Debtor.	)	D.C. No. CV-96-00133-PMP
DARREL[ ] D. SMITH,	)	
Appellant,	)	
v.	)	MEMORANDUM*
JOHN PETER LEE, LTD.; TOM GRIMMETT, Trustee of The Chapter 7 Estate,	)	(Filed Mar. 20, 1998)
Appellees.	)	

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted: December 11, 1997
San Francisco, California

Before: BROWNING, PREGERSON, and HAWKINS, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Because the parties are familiar with the factual and procedural history of this case, we will not recount it here except as necessary to clarify our decision.

I. The Bankruptcy Court Had Sufficient Cause To Convert Smith's Chapter 11 Reorganization Plan into a Chapter 7 Liquidation.

The bankruptcy court properly converted Smith's Chapter 11 reorganization plan to a Chapter 7 liquidation pursuant to 11 U.S.C. § 1112(b), which permits such conversion for cause. That section permits conversion if there is a "material default by the debtor with respect to a confirmed plan," 11 U.S.C. § 1112(b)(8), or there is an "inability to effectuate substantial consummation of a confirmed plan," 11 U.S.C. § 1112(b)(7). A bankruptcy court's decision to convert a Chapter 11 reorganization into a Chapter 7 liquidation for cause is reviewed for an abuse of discretion. *See Johnston v. Jem Dev. Co.*, 149 B.R. 158, 160 (9th Cir. BAP 1992).

The bankruptcy court found that Smith's reorganization plan imposed two deadlines: (1) Smith had a five year deadline to repay his creditors and (2) Smith had a threshold deadline that required him to make reasonable efforts to produce and market prints of his Maxfield Parrish painting, *Daybreak*, during the pendency of the plan. The court found that Smith was in material default of the plan because he failed to meet his threshold deadline to make reasonable efforts to produce and market those prints.

The plain language of the reorganization plan requires Smith to make reasonable efforts to produce and

market prints of *Daybreak*. Moreover, the bankruptcy court explicitly told Smith that he had an obligation to make such efforts at the hearing on the motion to convert held on May 1, 1995, and warned Smith that it would convert his case to a Chapter 7 liquidation if he failed to do so. The court repeated this admonition at the status hearing held on October 24, 1995. Despite these repeated and explicit warnings, Smith exerted minimal efforts to produce or market prints of *Daybreak*. The bankruptcy court therefore did not abuse its discretion in finding that Smith materially defaulted on his confirmed Chapter 11 plan.

The bankruptcy court also had cause to convert Smith's Chapter 11 reorganization plan into a Chapter 7 liquidation because of Smith's inability to substantially consummate the reorganization plan. Smith's Chapter 11 reorganization plan identified two sources of funding to repay Smith's creditors: (1) the proceeds of Smith's community property claim that related to his former wife's interest in the Tropicana Hotel & Casino ("the Tropicana litigation") and (2) the production and sale of prints of *Daybreak*.

When the court conducted the hearing on the motion to convert, Smith had already obtained a quantum meruit recovery of only $80,000 in the Tropicana litigation. Smith's first method of funding the plan thus failed to even approach his "conservative" estimate that the Tropicana litigation was worth "at least $9,000,000.00." Smith's second method of funding the plan likewise proved inadequate. As the previous discussion reveals, Smith failed to make "reasonable efforts" to produce and market prints of *Daybreak*. Indeed, Smith concedes that printing

Daybreak "proved [i]nfeasible." Therefore, the bankruptcy court did not abuse its discretion in finding that Smith could not substantially consummate the plan.

II. The Bankruptcy Court Had Jurisdiction To Vest Smith's Assets into a Chapter 7 Estate upon Conversion.

Smith also argues that the bankruptcy court did not have jurisdiction to convert his Chapter 11 reorganization plan to a Chapter 7 liquidation under § 1112(b). Specifically, Smith argues that the bankruptcy court did not have jurisdiction over his assets after confirmation of his reorganization plan because § 1141(b) and (c) provide that confirmation of a plan vests all of the property of the estate in the debtor free and clear of all intervening interests. Therefore, he argues that because *Daybreak* was vested in him upon confirmation of the reorganization plan, the court did not have the authority to "revest" the painting into a Chapter 7 estate upon conversion. Smith concedes that a bankruptcy court retains post-confirmation jurisdiction over the debtor's assets if the reorganization plan limits the vesting provisions of § 1141(b) or if a plan expressly provides for ongoing jurisdiction, but argues that his plan failed to do so.

Smith' argument fails because his reorganization plan did limit the vesting provisions of § 1141(b) and his plan also explicitly provided that the bankruptcy court would have ongoing jurisdiction over the reorganization proceedings. First, ownership of *Daybreak* did not vest in Smith free and clear of all claims and intervening interests upon confirmation. Section 1141(b) provides that:

"*Except as otherwise provided in the plan* or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." (Emphasis added.) Thus, plan provisions may prevent the debtor's property from vesting in the debtor. A plan may prevent such vesting even if "[t]he plan does not state in unambiguous terms that the property of the estate does not revest in the debtor." *In re Hillis Motors, Inc.*, 997 F.2d 581, 589 (9th Cir. 1993).

In *Hillis Motors*, the debtor's confirmed plan provided, *inter alia*, that (1) the management and control of the debtor business would remain in the trustee's hands, (2) a fixed percentage of the company's post-confirmation profits "were to be paid to the estate for disbursement as ordered by the bankruptcy court," and (3) "[t]he bankruptcy court retained jurisdiction to insure that the purpose and intent of the plan were carried out." *Id.* at 587. Based on these provisions, the *Hillis* court concluded that the estate property did not vest in the debtor upon confirmation because under the plan, the debtor "was not free to deal with its property and the world as it would have been if it had not been subject to the jurisdiction of the bankruptcy court." *Id.* at 589.

The provisions of Smith's reorganization plan similarly limited the vesting provisions of § 1141(b). Smith's reorganization plan provided that his creditors "will receive [payments] on account of their claims as soon as funds are available [from the sale of prints of *Daybreak*]. . . . If, sixty (60) months after confirmation, secured creditors have not been substantially paid, Debtor will make arrangements to sell or auction the painting *Daybreak.*" Thus, *Daybreak* did not vest in Smith free and clear

of all intervening interests upon confirmation. Instead, Smith's creditors retained a contingent interest in the painting.

Moreover, as the district court pointed out, Smith's reorganization plan *explicitly provides* that the bankruptcy court "shall continue to retain exclusive jurisdiction over these proceedings until the provisions of the plan have been fully performed for the following purposes . . . (6) supervising the enforcement of the plan; and (7) for such other purposes as the court shall determine." In order to supervise the enforcement of the plan, the bankruptcy court had to have the authority to enforce its provisions.[1] Thus, the bankruptcy court necessarily had jurisdiction over Smith's assets to require him to distribute the funds from proceeds of the sale of prints of *Daybreak* or to force Smith to sell *Daybreak* if he was unable to repay his creditors. Therefore, Smith "was not free to deal with [his] property and the world as [he] would have been if [he] had not been subject to the jurisdiction of the bankruptcy court." *Id.* at 589.

The court's broad and explicit retention of jurisdiction indicates that the plan, and thus the parties, did

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[1] The *Hillis* court recognized that "[t]he effectiveness of the bankruptcy court's continued supervision of [the debtor] and its administration of the estate for the benefit of the creditors depended on the court's being able to prevent any efforts to exercise control over the property of the estate." *Id.* at 590. Likewise, in this case, the bankruptcy court's ability to effectively supervise the plan for the benefit of Smith's creditors requires the court to have the authority to enforce its provisions.

contemplate that the bankruptcy court would have continuing jurisdiction over *Daybreak*. Therefore, the bankruptcy court had jurisdiction to convert Smith's assets into a Chapter 7 liquidation.

Thus, the district court's affirmation of the bankruptcy court is AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: DARREL[ ] D. SMITH, [ ] Debtor.	No. 96-17214 D.C. No. CV-96-00133-[PMP]
DARREL[ ] D. SMITH, Appellant, v. JOHN PETER LEE, LTD.; TOM GRIMMETT, Trustee of The Chapter 7 Estate, Appellees.	**ORDER** (Filed Jul. 1, 1998)

Before: BROWNING, PREGERSON, and HAWKINS, Circuit Judges.

Appellant's petition for rehearing is denied.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

In re:	BK-S-91-21026-RCJ
DARREL[ ] D. SMITH, Debtor.	CV-S-96-0133-PMP (RLH) Appeal Ref 96-2
	OPINION
DARREL[ ] D. SMITH, Appellant, v. JOHN PETER LEE, LTD. Appellee.	(Filed Oct. 10, 1996)

Appellant Darrel[ ] D. Smith ("Smith") appeals the Order entered by the United States Bankruptcy Court (D. Nev.) on February 6, 1996, converting his Chapter 11 Plan to a Chapter 7 liquidation. Smith's Motion for Reconsideration was denied on February 15, 1996. Smith filed his notice of appeal to the United States District Court on February 7, 1996, and objected to a referral to the Bankruptcy Appellate Panel on February 15, 1996. On February 20, 1996, this Court denied Smith's Emergency Motion for Stay of Order Granting Order to Convert Smith appealed this decision, and on March 15, 1996, the Ninth Circuit Court of Appeals denied his appeal. On August 2, 1996, Smith filed his Opening Brief (# 594). Appellee John Peter Lee, Ltd., (# 596) and Trustee Tom

Grimmet (# 595) filed Reply Briefs on August 16, 1996. Smith filed his Reply Brief (# 597) on August 26, 1996.

I. Background

Appellant Smith originally filed his Voluntary Petition under Chapter 11 of the Bankruptcy Code in the District of Nevada on March 22, 1991. Smith's Third Plan of Reorganization ("Plan") was confirmed by an Order on January 11, 1994.[1] The means of funding the Plan were Smith's litigation against his ex-wife for an interest in the Tropicana Hotel and Casino, and from the making and selling of prints of the Maxfield Parrish painting *Daybreak,* which Smith owned. (Third Plan of Reorg. p. 7).

On March 31, 1995, John Peter Lee, Ltd., ("Lee") moved to withdraw as Smith's attorney. Lee also moved to convert Smith's Chapter 11 case to a case under Chapter 7, and to require the sale of the bankruptcy estate's assets, most notably *Daybreak*. On May 10, 1995, the Bankruptcy court granted Lee's Motion to Withdraw.

The preliminary hearing on the Motion to Convert was held on May 1, 1995. The bankruptcy court denied Lee's motion without prejudice, and set a status check hearing for October 3, 1995. In its ruling,the bankruptcy court stated that Smith could not simply stand on the litigation as the source of payment, but that Smith must produce prints of *Daybreak* with reasonable haste. (Trans. May 1 Mtn. to Convert, p. 15.) A second status hearing

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[1] Smith's first two proposed Chapter 11 plans were not confirmed due to Smith's involvement in litigation which was eventually settled or otherwise resolved.

was set for October 24, 1995, to allow Smith to show that he was not in default of the Plan. At the October 24 hearing, the bankruptcy court ordered Smith to show at a third hearing on January 23, 1996, that he had made "reasonable efforts to start producing prints and marketing them." (Trans. Oct. 24 Status Hearing, p. 1). The bankruptcy court also stated its intention to convert the case to Chapter 7 if such efforts were not shown at the next hearing. (Trans. Oct. 24 Status Hearing, p. 1).

At the January 23, 1996, hearing, the bankruptcy court found that Smith had not made reasonable efforts to sell and market prints of *Daybreak*.[2] A tentative ruling was made to convert the case to Chapter 7, but the court did not order a sale of *Daybreak* at that time. (Trans. Jan 23 Mtn. to Convert, p. 12). The court indicated it would appoint a Trustee, but allowed Smith one week to file a Motion for Reconsideration.

Smith filed a Motion for Reconsideration which the bankruptcy court denied on February 15, 1996. A timely Notice of Appeal to this Court was filed on February 8, 1996.

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[2] Smith's state court litigation against his ex-wife was largely unsuccessful. His claim for community property in the Tropicana Hotel was denied, and his recovery in *quantum meruit* was $80,000. (Trans. May 1 Mtn. to Convert p. 4). Smith had anticipated that his claims in the suit would be worth $9,000,000 as a conservative estimate. (Third Plan of Reorg. p. 8).

II. Standard of Review

The bankruptcy court's findings of fact shall not be set aside by a reviewing court unless those findings are clearly erroneous. *In re Canland*, 90 F.3d 1466, 1469 (9th Cir. 1996). Conclusions of law are reviewed *de novo. Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 191 (9th Cir. 1995). A bankruptcy court is given wide discretion to convert a Chapter 11 case to Chapter 7 for cause, and such a conversion is reviewed under an abuse of discretion standard. *Johnston v. Jem Development Co., (In re Johnston)* 149 B.R. 158, 160 (9th Cir. BAP Nev. 1992). Legislative history indicates that cause is broadly defined, allowing a court to "consider other factors as they arise, and to use its equitable powers to reach an appropriate result in individual cases." H.R. Rep. No 595, 95th Cong., 1st Sess. 405, n.1 at 405-06 (1977).

III. Discussion

A. Smith's Failure to Sell and Market Prints of *Daybreak* Constituted Sufficient Cause to Convert His Chapter 11 Case to Chapter 7.

Smith alleges that the bankruptcy court erred in determining that the failure to sell and market prints of *Daybreak* justified conversion of Smith's Chapter 11 Plan to Chapter 7. This Court finds that the basis for the bankruptcy court's decision to convert is clearly articulated in the record and well supported by factual findings, and therefore upholds the decision of the bankruptcy court.

1. The Bankruptcy Court's Interpretation of the Plan.

The bankruptcy court interpreted the Plan as a matter of fact and law as requiring that the Plan be funded through Smith's state court litigation and the publishing, printing, and making of prints of *Daybreak*. (Trans. Jan. 23 Mtn. to Convert p. 7). The Plan states, "The Debtor has two means upon which to fund his Plan of Reorganization, litigation and making and selling prints of the painting *Daybreak*, which he owns." (Third Plan of Reorg. p. 7). On page nine, the Plan states, "Smith will use the proceeds of the litigations and the funds from the sales of prints of *Daybreak* to pay all creditors in full with 8% interest." *Id.* at 9.

The bankruptcy court interpreted the Plan as encompassing two deadlines, one a 60-month time period in which to pay creditors, and the other a requirement that Smith make reasonable efforts towards producing and marketing prints. (Trans. Oct 24 Mtn. to Convert p. 1). The court explicitly stated that it was removing the ambiguity and that Smith was to return in January and show strong efforts towards the beginning of production and marketing of prints. (Trans. Oct 24 Mtn. to Convert p. 1). Given the plain language of the Plan, the bankruptcy court's interpretation requiring reasonable efforts to sell and market prints was entirely appropriate.

The Plan on page nine provided that if creditors were not paid or if Smith lost both litigations and there were insufficient profits from the prints of *Daybreak* to pay all claims, Smith would arrange to sell *Daybreak* to pay creditors. (Third Plan of Reorg. p. 9). Smith claims this

imposed a duty on him to engage in a Chapter 11 liquidation of *Daybreak* in the event other funding sources failed. Therefore, Smith claims, the bankruptcy court had no grounds to convert his Chapter 11 Plan, since a Chapter 11 sale was the final option for funding the Plan. Smith alleges he would only be in breach of the Plan if he refused to sell once the litigation, the sale of prints and the sale of *Daybreak* itself had failed.

Smith alleges that the bankruptcy court interpreted the Plan as creating an absolute duty to sell prints of *Daybreak*, and that such an absolute duty is not within the plain language of the Plan. However, the bankruptcy court did not covert the Plan because Smith failed to sell or market prints, but because he failed to make *reasonable efforts* to sell or market prints. The court did not reinterpret the plan to include an absolute duty to sell, as Smith alleges, rather it held that there were two deadlines, one of reasonable efforts to sell and market prints and the 60-month calendar deadline. (Trans. Oct 24 Mtn. to Convert p. 1). The court ruled that Smith had failed to meet the threshold showing of reasonable efforts, and was in material default of the Plan. Therefore, this Court holds that the bankruptcy court appropriately interpreted the Plan to require reasonable efforts to sell and market prints of *Daybreak*.

2. The Bankruptcy Court's Finding of Cause to Convert Smith's Chapter 11 Plan to Chapter 7.

The bankruptcy court was correct in concluding that cause existed to convert Smith's Chapter 11 Plan to Chapter 7. The court's conversion of Smith's case was

justified under 11 U.S.C. § 1112(b)(7) and (8).[3] Section 1112(b) provides for a conversion of Chapter 11 case to a Chapter 7 case for cause, which includes the inability to effectuate substantial consummation of a confirmed plan and material default by the debtor. The finding that Smith had defaulted on the plan and was unable to effectuate the Plan are factual issues that will be overturned only if clearly erroneous.

The bankruptcy court held four status hearings to allow Smith to show that he was making reasonable efforts and that he had the ability to sell and market prints of *Daybreak*.[4] After the court preliminary granted the motion to convert, Smith was given a further opportunity to file a motion for reconsideration before *Daybreak* was sold pursuant to Chapter 7. (Trans Jan 23 Mtn. to Convert p. 12). Smith had ample opportunity to make a showing of reasonable efforts to sell and market the prints.

The record is clear that Smith was unable to effectuate a substantial consummation of the confirmed plan under section 1112(b)(7). The court found that making prints was impractical due to over-production and the complications of having the painting tied up in a bankruptcy case, and that Smith did not have the funds necessary to undertake the effort to sell and market prints himself. (Trans. Jan 23 Mtn to Convert p. 9-10). The

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[3] All references are to 11 U.S.C. unless otherwise noted.

[4] Hearings were held on May 1, 1995, October 3 and 24, 1995, and January 23, 1996.

litigation method of funding the Plan was also impractical, since Smith lost the community property claim in the Tropicana Hotel and is waiting for an appeal to the Nevada Supreme Court. Even if the Nevada Supreme Court remands the case, it was not an abuse of discretion for the bankruptcy court to [conclude] that Smith would not recover his monetary claim within the 60-month time frame in the Plan.

There was also an adequate factual finding to support the bankruptcy court's decision to convert the case under section 1112(b)(8) due to a material default of the confirmed Plan. The court resolved any possible ambiguity in the Plan by clearly stating that a threshold showing of reasonable efforts to sell and market prints must be met by Smith. Smith's only effort was a mass mailing of 200 form letters, sent in November and December of 1995. The letters inquired if certain persons or entities would be interested in using a poster of *Daybreak* in a promotion or in purchasing *Daybreak* while Smith retained rights to reproduce or repurchase the painting. (Jan 16 Status Report, Appendix). Of the entities solicited, only Wal-Mart showed some interest by requesting a formal application. (Jan 16 Status Report, p. 2).

The bankruptcy court was not clearly erroneous in determining that Smith's minimal effort seven months after the Motion to Convert was originally filed was a default of his obligation to use reasonable efforts to sell and market prints of *Daybreak*. The court's [conversion] to Chapter 7 based on either impracticality or on material default by Smith is adequately supported by facts in the record. Smith had 10 months to show reasonable efforts to sell and market prints of *Daybreak*. His state court

litigation, which he estimated was worth $9,000,000, resulted in an award of $80,000. The bankruptcy court found that implementation of the Chapter 11 plan was not feasible, and that Smith had materially defaulted in the Plan. Furthermore, the court found that selling *Daybreak* in early 1996 would be in the best interest of the creditors. The factual findings of the bankruptcy court were that the painting had just come off tour, that the painting had been displayed extensively, and that the longer the sale was postponed after the tour, the lower the eventual sale price would be. (Trans. Jan 23 Mtn to Convert p. 10-11). The final sale of *Daybreak* illustrates that these findings were correct. While estimates from all parties for the sale price were approximately $1.5-2.5 million, *Daybreak* eventually sold at a Sotheby's Auction for $3.9 million. (Appellee Lee's Reply Brief, p. 8). This Court therefore upholds the conversion of Smith's Chapter 11 case to Chapter 7.

B. The Conversion of a Confirmed Plan From Chapter 11 to Chapter 7 Under 11 U.S.C. Section 1112(b) (7-9).

The ability of a bankruptcy court to convert a confirmed Chapter 11 Plan to a Chapter 7 case is covered by section 1112(b). Subsection (b) provides for an involuntary conversion for cause, which specifically includes: (7) the inability to effectuate substantial consummation of a confirmed plan; (8) material default by the debtor with respect to a confirmed plan; and (9) termination of a plan by reason of the occurrence of a condition specified in the plan. 11 U.S.C. § 1112(b) (1996.) Smith argues that several other provisions of Chapter 11 nullify or greatly limit a

court's ability to order conversion. As Smith's interpretation of section 1112 alters the plain meaning of the statute and limits a bankruptcy court's power without any showing of Congressional intent, this Court rejects such an interpretation and affirms the decision of the bankruptcy court.

The fundamental basis for statutory interpretation is the language of the statute itself. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990). Courts must presume that Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Smith alleges that sections 541, 1141 and 348 work to rewrite 1112, the provision regarding a bankruptcy court's ability to convert a Chapter 11 case to a Chapter 7 case. Section 541 provides:

> (a) The commencement of a case under section 301, 302 or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: (1) [A]ll legal or equitable interests of the debtor in property as of the commencement of the case. . . .

11 U.S.C. § 541 (1996). Section 1141 states that, "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." Finally, section 348(a) provides:

> Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief

> under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.

11 U.S.C. § 348(a) (1996). Smith argues that these three provisions, taken as a whole, eliminated the bankruptcy court's ability to order a conversion of his case.

Smith alleges that although section 1112 provides for conversion of a confirmed plan in certain situations, section 1141 vests all property of a bankruptcy estate in the debtor when a plan is confirmed. Therefore, the assets of Smith's estate vested in Smith upon the confirmation of his Plan, and there was no bankruptcy estate to convert to Chapter 7. Since section 541 provides for the creation of an estate upon the *commencement* of a case, and not upon a conversion of a case, the bankruptcy court had no power to create a new Chapter 7 estate. Finally, Smith argues that because section 348(a) provides that the date of commencement of the case does not change, no new estate is created.

Smith acknowledges that there is no Ninth Circuit or other Circuit Court case law directly on point. Bankruptcy courts have split as to this particular issue. As a result, Smith relies primarily on *In re T.S.P. Industries*, 117 B.R. 375 (Bankr. N.D. Ill. 1990) ("*T.S.P.*") for support. In *T.S.P.*, the United States Trustee moved to dismiss, or in the alternative to convert a Chapter 11 case to Chapter 7 based on default by the Debtor. 117 B.R. at 375. The Trustee knew of no assets in the hands of the Debtor at that time. *Id.* at 376. The court noted that "[c]ourts have

wide discretion in deciding whether or not to dismiss or [convert] a case." *Id.* Despite the plain language in section 1112 allowing courts to convert a confirmed plan, the court found that the bankruptcy court had no power to convert the case once the plan had been confirmed, since the estate had vested in the Debtor. *Id.* at 378-79. The court found that conversion to Chapter 7 did not "revest" property in the estate, and therefore, there was no estate to convert. *Id.* at 378.

The bankruptcy court in the present case expressly rejected the holding of the *T.S.P.* court. (Feb 15 Mtn for Reconsid. p. 1).[5] This Court upholds the bankruptcy court's decision, and declines to follow the reasoning of the *T.S.P.* court.

If the *T.S.P.* court's premise was correct, section 1112(b) (7-9) would be meaningless. There would be no method of converting any confirmed plan under Chapter 11, since by definition a confirmed plan would entail destruction of the Bankruptcy estate and a vesting of all previous estate property in the Debtor. All confirmed plans would be unenforceable, since there would be no bankruptcy estate over which a court would have jurisdiction.

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[5] The bankruptcy court stated that property revested in the Debtor upon confirmation becomes property of a Chapter 7 estate upon conversion. (Feb 15 Mtn. For Reconsid. P. 1-2). Even if Appellant is correct that a *new* estate is not created, conversion of the original Bankruptcy estate is entirely appropriate, since the estate survives confirmation for purposes of enforcing the Chapter 11 plan.

The *T.S.P.* court attempted to avoid this conclusion through two exceptions. The court stated that any benefit that creditors received from conversion would be illusory, as there was no property of the estate after conversion, and therefore there was nothing to benefit from. *Id.* at 378. However, the court then stated that post-confirmation conversion of a Chapter 11 plan could be in the best interest of the creditors if: (1) there was a preference or fraudulent conveyance that occurred before the commencement of the Chapter 11 proceeding and (2) there were not current significant assets. *Id.* at 378-79. The court gave no explanation as to why section 541 did not vest the property in the debtor in such a situation. The court also failed to explain why an estate survived confirmation of a plan *only* when fraud occurred before the estate was created and no significant assets existed at the time of conversion. Secondly, the *T.S.P.* court argued that if a plan provided for conversion and the retention of jurisdiction over property in the event of a default, conversion could be appropriate. *Id.* at 379. The court provided no legal precedent or Congressional support for allowing specific language in an individual plan to override section 541, which vests property in the Debtor upon confirmation of a plan.

The *T.S.P.* court's analysis would virtually eliminate the power of courts to convert confirmed plans, a power which is expressly granted in section 1112(b) (7-9), and it would grant courts the power to nullify the revesting of the estate in the debtor under section 541 by explicitly retaining jurisdiction over a particular plan. This Court will not change the statutory power of a court to convert under section 1112(b) (7-9) in such a drastic manner

without a finding of Congressional intent. Furthermore, the Plan in this case specifically provided:

> After confirmation the court shall continue to retain exclusive jurisdiction over these proceedings until the provisions of the Plan have been fully performed for the following purposes: . . . (6) supervising the enforcement of the plan; and (7) for such other purposes as the court shall determine.

(Third Plan of Reorg p. 12). Thus, even under the analysis of the *T.S.P.* case, the bankruptcy court retained jurisdiction to supervise enforcement and for other purposes. This Court finds that such provision encompassed conversion, and as a result, conversion was a proper exercise of the bankruptcy court's discretion.

Smith also cites *In re State Airlines*, 873 F.2d 264 (11th Cir. 1989) (*"State Airlines"*) in support of his interpretation of section 1112(b) (7-9). However, *State Airlines* decided the "very narrow issue" that the automatic stay under section 362(a) was not reimposed upon conversion. 873 F.2d at 267 n. 5., 278. The court stated that, "[i]f Congress had intended for a conversion to trigger the automatic stay of section 362 it could very easily have said so explicitly." *Id.* at 268. The court also found that if Congress had intended to have such a [significant] impact as reimposing the stay, it would have indicated its intention to do so. *Id.*

Adopting the *State Airlines* rationale, if Congress had intended section 1141 to limit conversion under 1112, it would have so indicated. If Congress intended that courts must retain jurisdiction in order to utilize subsections 7-9 it would have articulated that limitation in the statute.

Congress explicitly provided a clear mechanism to convert confirmed plans under 1112(b) (7-9). This Court refuses to override the language Congress provided by rewriting section 1112(b) to virtually prohibit conversion of confirmed plans.

Given the statutory language of section 1112(b) (7-9), this Court finds the rationale of cases such as *In re Calania Corp.*, 188 B.R. 41 (Bankr. M.D. Fla. 1995) (*"Calania"*) persuasive. In *Calania,* the court examined the interplay of the sections of the Bankruptcy Code at issue, and concluded that:

> The confirmation of a plan, however, does not necessarily dispose of the bankruptcy case. Instead, the case generally remains pending even after confirmation until the plan is substantially consummated and a final decree is entered. Therefore, it appears that the case continues even though all property of the estate has been vested in the reorganized debtor pursuant to Section 1141(b).

Id. at 43. The court also found that it would be "utterly pointless" for Congress to create the provisions of 1112(b) (7-9) if section 1141 meant there would be no trust assets to administer. *Id.* at 43.

The only interpretation of the interplay of sections 348, 541, 1141 and 1112(b) that is consistent with the plain language of 1112 is the interpretation of the *Calania* court. Section 348, which provides that the date of commencement of a plan does not change upon conversion simply means that property constituting the estate of the debtor is determined as of the date of commencement. When a plan is converted, this is the only property that the court

has jurisdiction over. A court would not look at property acquired after confirmation in determining the estate for purposes of conversion to Chapter 7. *See Calania,* 188 B.R. at 42-43.

The confirmation of a Chapter 11 plan does not automatically terminate a bankruptcy court's jurisdiction. *In re Sultan Corp.,* 81 B.R. 599, 602 (B.A.P. 9th Cir. 1987). If section [1141] truly vested property in the debtor in such a way that it could never be reached by a court, there would be no way to enforce a confirmed plan under Chapter 11. A debtor could, as in the present case, materially default or lose all ability to effectuate a plan and creditors would be entirely without remedy. Such an interpretation is contrary to the plain language of 11 U.S.C. and the goals of making creditors whole. For these reasons, this Court upholds the conclusions of law and fact of the bankruptcy court in this case.

IT IS THEREFORE ORDERED THAT the Order converting Smith's Chapter 11 case to Chapter 7 entered by the bankruptcy court is AFFIRMED.

DATED: October 10, 1996

/s/ Philip M. Pro
PHILIP M. PRO
United States
District Judge

JOHN PETER LEE, LTD.
NANCY L. ALLF, ESQ.
Nevada Bar No. 000128
830 Las Vegas Blvd. South
Las Vegas, Nevada 89101
(702) 382-4044

Attorneys for Debtors

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re	)	Case No. BK-S-91-01026-RCJ
DARREL D. SMITH,	)	Chapter 11
Debtor.	)	DATE: January 23, 1996 TIME: 11:00 a.m.

ORDER TO CONVERT CASE TO CHAPTER 7

(Filed Feb. 6, 1996)

The continued hearing on the Motion of John Peter Lee, Ltd. to Convert the Debtor's Chapter 11 Case and to Require the Sale of Maxfield Parrish's *Daybreak* and Other Estate Assets having come on for hearing before this Honorable Court, R. Clive Jones presiding, on Tuesday, January 23, 1996, and John Peter Lee, Ltd. being present and represented by its counsel, John Peter Lee, Esq. and Nancy L. Allf, Esq., and the Debtor, Darrel D. Smith, being present, and creditors Louis Marlas and Carleton Briggs being present, and the Court having heard the arguments and representations of counsel, and having considered the Motion and the files and the pleadings

and papers and having made oral findings of fact on the record, and for good cause appearing, it is hereby

ORDERED, ADJUDGED AND DECREED that this case shall be converted to a case under Chapter 7; and it is hereby further

ORDERED, ADJUDGED AND DECREED that the United States Trustee shall name a Trustee immediately; and it is hereby further

ORDERED, ADJUDGED AND DECREED that the Debtor may file a brief within one (1) week in response to Movant's Supplemental Brief in Support of Motion to Convert Chapter 11 Case and to Require the Sale of Maxfield Parrish's *Daybreak* and Other Estate Assets; and it is hereby further

ORDERED, ADJUDGED AND DECREED that American Illustrators Gallery shall retain possession of the painting *Daybreak* and continue to insure it in the amount of $5 million subject to the April, 1995 Order which gave it possession of the painting, pending the decision of the Trustee to remove it from the possession of American Illustrators Gallery.

DATED this 5th day of [February] 1996.

ROBERT CLIVE JONES
Honorable Robert Clive Jones
United States Bankruptcy Judge

SUBMITTED BY:

JOHN PETER LEE, LTD.

BY: /s/ Nancy L. Allf
Nancy L. Allf, Esq.
Nevada Bar No. 000128
830 Las Vegas Boulevard South
Las Vegas, Nevada 89101

REVIEWED/APPROVED AS TO FORM AND CONTENT

/s/ Darrel D. Smith
Darrel D. Smith
Post Office Box 93118-100
Las Vegas, Nevada 89193

REVIEWED/APPROVED AS TO FORM AND CONTENT

OFFICE OF THE UNITED STATES TRUSTEE

BY: BARRY H. JENKINS
Barry H. Jenkins, Esq.
Nevada Bar No. 005027
600 Las Vegas Boulevard South
#430
Las Vegas, Nevada 89101

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA
LAS VEGAS, NEVADA

In Re: DARREL D. SMITH, Debtor.	* * * * *	Case No. BK-S-91-01026-RCJ Las Vegas, Nevada February 15, 1996

****

COURT'S RULING:

(1) MOTION FOR RECONSIDERATION;
(2) JOHN PETER LEE'S MOTION FOR RELIEF FROM AUTOMATIC STAY re PAINTING "DAYBREAK";
(3) TRUSTEE'S MOTION TO SELL PERSONAL PROPERTY FREE AND CLEAR OF LIENS AT PUBLIC AUCTION, EMPLOY AUCTIONEER AND PAY COMMISSION.

BEFORE THE HONORABLE ROBERT CLIVE JONES
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtor
(in proper person)

DARREL D. SMITH
P.O. Box 93118-100
Las Vegas, NV 89193

JOHN PETER LEE, LTD.
BY: Nancy L. Allf, Esq.
830 Las Vegas Blvd. S.
Las Vegas, NV 89101

For Trustee:
(Tom Grimmett)

HALE, LANE, PEEK, DENNISON
& HOWARD
BY: LENARD E. SCHWARTZER, ESQ.
2300 W. Sahara Ave., #800
Las Vegas, NV 89102

For creditors: Lawrence
Doumani, Dahlia Doumani,
Dominique Doumani, Fred
Doumani, Jr., Ronald
Doumani Trust:

NITZ, WALTON & HAMMER
BY: WILLIAM H. HEATON, ESQ.
514 S. Third St.
Las Vegas, NV 89101

(Previous proceedings not transcribed this volume)

COURT'S RULING

THE COURT: All right. The ruling on this is I'm going to deny the motion for reconsideration; I'm going to deny the motion to lift stay at this time. It appears that there's a strong likelihood of value in excess, of good potential value in excess, of the liens; and therefore, it would be unreasonable to lift the stay at this point.

I'm going to deny the motion for reconsideration. First as to the law, this is my interpretation of the law. If I'm wrong, the appellate court will correct me. I reject the *TSP* case. My statement of the law is that the property of an estate does revest in the Debtor upon confirmation, but upon conversion under 541 the property of the Debtor, subject to intervening liens, encumbrances or

other encumbrances created by the Debtor while it was revested in the Debtor's name, does become property of an estate, a Chapter 7 estate.

The encumbrances that could be created, of course, are those that are created in the plan, for example – encumbrances that are acknowledged are created in the plan – or upon revestment the Debtor has the right, or may have the right subject to the plan, to deal with the property as he or she may, including creation of new liens on that property. And when the property becomes property of the Chapter 7 estate upon conversion, it's subject to those liens, because the property was revested and titled in the Debtor. But it does in fact become property of an estate, a Chapter 7 estate, and therefore I have to reject *TSP*.

Again, that's a statement of the law; if that's wrong, the appellate court can correct me on that. That's straightforward; that's something that the appellate court can second guess de novo.

* * *

JOHN PETER LEE, LTD.
NANCY L. ALLF, ESQ.
Nevada Bar No. 000128
830 Las Vegas Boulevard South
Las Vegas, Nevada 89101
(702) 382-4044

Administrative and Secured Creditor

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:	)	Case No. BK-S-91-21026-RCJ
DARREL D. SMITH,	)	Chapter 7
	)	
Debtor.	)	DATE: February 15, 1996
		TIME: 9:00 a.m.
		MOTION NO.: 96-MS-10073

ORDER REGARDING DEBTOR'S MOTION FOR RECONSIDERATION, JOHN PETER LEE, LTD,'S MOTION FOR RELIEF FROM AUTOMATIC STAY AND THE TRUSTEE'S MOTION TO SELL PERSONAL PROPERTY FREE AND CLEAR OF LIENS AT PUBLIC AUCTION, EMPLOY AUCTIONEER AND PAY COMMISSION

(Filed Feb. 16, 1996)

The Debtor's Motion For Reconsideration of the conversion of his case from Chapter 11 to Chapter 7, John Peter Lee, Ltd.'s Motion For Relief From Automatic Stay and the Trustee's Motion to Sell Personal Property Free and Clear of Liens at Public Auction, Employ Auctioneer and Pay Commission having come on for hearing before this Honorable Court, R. Clive Jones presiding on Thursday, February 15, 1996, at 9:00 a.m. and the Debtor being

present and representing himself in proper person and the Trustee being represented by his counsel, Lenard E. Schwartzer, Esq. of Hale, Lane, Peek, Dennison & Howard, Administrative and Secured Creditor John Peter Lee, Ltd. being represented by Nancy L. Allf, Esq. of John Peter Lee, Ltd. and creditor Louis A. Marlas having been present, and the Court having heard the representations and arguments of counsel and having made oral findings of fact on the record, and for good cause appearing, it is hereby

ORDERED, ADJUDGED AND DECREED that the Debtor's Motion For Reconsideration on the conversion of his case from Chapter 11 to Chapter 7 is hereby denied; and it is hereby further

ORDERED, ADJUDGED AND DECREED that John Peter Lee, Ltd.'s Motion For Relief From Automatic Stay is hereby denied without prejudice; and it is hereby further

ORDERED, ADJUDGED AND DECREED that the Trustee's Motion to Sell Personal Property Free and Clear of Liens at Public Auction, Employ Auctioneer and Pay Commission is hereby granted; and it is hereby further

ORDERED, ADJUDGED AND DECREED that the Trustee shall sell the painting free and clear of liens by consigning it to Sotheby's for their May 1996 Auction; and it is hereby further

ORDERED, ADJUDGED AND DECREED that upon the sale of the painting, liens of all lienholders shall attach to the proceeds of sale; and it is hereby further

ORDERED, ADJUDGED AND DECREED that Sotheby's shall be employed as auctioneer, with their commission to be paid from the sale. If the painting should sell between $1.5 million and $2.5 million, the commission rate will be 5%, payable from the proceeds of sale. If the painting sells for an aggregate total exceeding $2.5 million, the commission rate shall be 4%, which shall be paid from the proceeds of sale. It is hereby further

ORDERED, ADJUDGED AND DECREED that the sale of the painting is subject to a reserve which shall be set in the amount of $1.5 million; and it is hereby further

ORDERED, ADJUDGED AND DECREED that the sum of up to $20,000 shall be made available from the proceeds of sale to pay allowed Trustee's fees and expenses and allowed fees and expenses of the Trustee's attorney; and it is hereby further

ORDERED, ADJUDGED AND DECREED that enforcement of this Order shall be stayed for a period of ten (10) days after its entry and upon the expiration of the stay, the possession of the painting shall be relinquished by the American Illustrators Gallery to Sotheby's in a manner and at such location as Sotheby's shall specify in writing.

DATED this 16th day of February, 1996

/s/ Robert Clive Jones
Honorable Robert Clive Jones
United States Bankruptcy Judge

SUBMITTED BY

JOHN PETER LEE, LTD.

BY: /s/ Nancy L. Allf
Nancy L. Allf, Esq.
Nevada Bar No. 000128
830 Las Vegas Boulevard South
Las Vegas, Nevada 89101

APPROVED/DISAPPROVED AS TO
FORM AND CONTENT

HALE, LANE, PEEK, DENNISON & HOWARD

BY: /s/ Lenard E. Schwartzer
Lenard E. Schwartzer, Esq.
Nevada Bar No. 000399
2300 West Sahara, #800
Box 8
Las Vegas, Nevada 89102

APPROVED/DISAPPROVED AS TO
FORM AND CONTENT

/s/ Darrel D. Smith
Darrel D. Smith
P.O. Box 93118-100
Las Vegas, Nevada 89193

JOHN PETER LEE, LTD.
NANCY L. ALLF, ESQ.
Nevada Bar No. 000128
830 Las Vegas Blvd. South
Las Vegas, Nevada 89101
(702) 382-4044

Attorneys for Debtor

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re	)	Case No. BK-S-91-01026-RCJ
DARREL D. SMITH,	)	Chapter 11
	)	
Debtor.	)	DATE: November 23, 1993
	)	TIME: 11:00 a.m.
	)	

DEBTOR'S THIRD PLAN OF REORGANIZATION

* * *

CLASSES IMPAIRED UNDER THE
PLAN AND THEIR TREATMENT

* * *

Class 3 – Secured Creditors: This class consists of all persons or entities who claim a consensual lien in estate assets. The class consists of two creditors, John O. Chatt and Bob Noblitt, who will be paid as funds are available according to repayment terms outlined below. Chatt's lien arises from payments advanced to Smith secured by the painting *Daybreak*. Upon confirmation Chatt's lien will be recognized as a third lien in *Daybreak* subordinated to a first lien in favor of John Peter Lee, Ltd. of $200,000 and a second lien in favor of Edwards, Hale & Hansen of $100,000, in the amount of $746,304.84. This

amount is also secured by certain china, silver and stemware owned by the estate.

* * *

Creditors in this class will receive on account of their claims as soon as funds are available, equal monthly payments of principal and interest so that claims are paid within sixty (60) months after confirmation, with payments to commence during that month following the month in which funds are made available to fund the Plan. There is no pre-payment penalty. If, sixty (60) months after confirmation, secured creditors have not been substantially paid, Debtor will make arrangements to sell or auction the painting *Daybreak*. So long as Debtor has received judgments in the litigations being pursued to fund the Plan, he will not be in default of the sixty (60) month provision, even if they are stayed on appeal, and secured claims will be made as soon as practicable after collection of the judgment(s).

* * *

Interest will accrue on the principal amount of claims in this class at the rate of 8% per annum on the declining balance from such time as the liens were attached until the time of payment.

Class 4 – Unsecured Claims: This class consists of all noncontingent unsecured creditors with allowed claims. Claims in this class as allowed will be paid pro-rata as funds are available after payment of Classes 1, 2 and ongoing litigation expense and with Class 3. Interest will accrue on the allowed amount at the rate of 8% per annum from the date of the Chapter 11 filing until paid.

* * *

MEANS OF FUNDING AND IMPLEMENTING THE PLAN

The Debtor has two means upon which to fund his Plan of Reorganization, litigation and making and selling prints of the painting *Daybreak*, which he owns.

Debtor filed a complaint in District Court for Clark County, Nevada against Edward M. Doumani and his family on August 24, 1990. That Complaint will declare the rights of Smith and the Doumani family and whether his now ex-wife Mitzi's purported "transfer" to Edward M. Doumani ("Doumani") of her interest in the Tropicana Hotel & Casino in 1984 was valid. Trial is scheduled to commence on or about October 25, 1993.

The first manner for funding the Plan is the obtaining of a judgment in state court and litigation and collection of claims against Edward M. Doumani, Deil O. Gustafson ("Gustafson"), Lindquist & Vennum and John S. Jagiela in litigation pending in this court. Debtor believes that these claims are conservatively worth at least $9,000,000 to him alone, based upon funds improperly received by Doumani and Gustafson in proceeds of litigation involving Hotel Conquistador, Inc. and Ramada Resorts, Inc. ("Ramada").

The second manner in which Debtor can fund the Plan is by making reproductions and prints of Maxfield Parrish's painting *Daybreak*, which he owns, with all profits after payment of production costs and debtor's living expenses to fund the Plan. No projection concerning the costs or profit to the estate is possible at this time,

but Debtor will undertake all reasonable efforts to publish and market reproductions of the painting.

DESCRIPTION OF PLAN

To fund the litigation necessary to be able to pay all creditors in full, upon confirmation, a first lien in *Daybreak* will be allowed to John Peter Lee, Ltd. in the amount of $200,000 so the Debtor can pursue his litigation against Gustafson, Doumani, Lindquist & Vennum and Jagiela. Edwards, Hale & Hansen will have a second lien in the amount of $100,000. John O. Chatt's third position lien will be approved in the amount of $746,304.84, and John Peter Lee, Ltd. would be granted a fourth lien after Chatt in the painting. Debtor would proceed with both litigations and with the publishing of prints of *Daybreak,* using all proceeds after he receives a living expense of no more than $4,000.00 per month, to pay creditors. The right to receive $4,000.00 monthly will begin on confirmation and will be cumulative. Smith will act as his own disbursing agent, reporting quarterly to the Court. All distributions to creditors can be made without first obtaining an order of the Court, and will commence during that month following the month funds are received to fund the Plan.

Smith will use the proceeds of the litigations and the funds from the sales of prints of *Daybreak* to pay all creditors in full with 8% interest. As money is available, allowed administrative claims, ongoing litigation expense, post confirmation borrowing, and then priority, secured, unsecured and insider claims will be paid in that order. See also the treatment of each class, beginning on

page 4, for particulars. If prints of *Daybreak* are made, the production and marketing costs will be retired with the first funds received. After payment of those costs, all other proceeds will be used to fund the Plan. Distributions will be made pro-rata to classes, if there is insufficient cash to pay a class in full. Debtor will not need the permission of the Court to borrow money post-confirmation.

All claims will be paid in full within sixty (60) months of confirmation of the Plan. If, sixty (60) months after confirmation, creditors are not substantially paid, or if Debtor loses both litigations and there is insufficient profit from print of *Daybreak* to pay all claims, the Debtor will arrange to sell or auction *Daybreak* to pay creditors, except that if the Debtor has been awarded judgments in either litigation, which are on appeal or stayed, which are sufficient to pay claims as allowed, or a clearly erroneous finding is made against him which he timely appeals, then he will not be deemed to be in default of his Plan or required to sell or auction *Daybreak*. Smith reserves the right to dismiss this case upon payment in full to all creditors, with jurisdiction over the adversary proceedings to remain.

* * *

CONDITIONS

* * *

(d) *Continuing Jurisdiction.* After confirmation the court shall continue to retain exclusive jurisdiction over these proceedings until the provisions of the Plan have been fully performed for the following purposes:

(1) for determining the amount of any claims of security interest made by John O. Chatt;

(2) for determining the terms upon which the Debtor may further borrow from John O. Chatt;

(3) for resolving disputes relating to claims which have been filed but are disputed;

(4) for receiving and determining applications related to the Plan;

(5) for determining the dischargeability of certain debts of any creditors having standing who make timely application after confirmation;

(6) supervising the enforcement of the Plan; and

(7) for such other purposes as the court shall determine.

(e) *Additional Provisions Consented to by Debtor.* In addition to the foregoing, Debtor consents to the following provisions and consents to their inclusion in any order of the court, including the order of confirmation:

(1) that the Debtor be required by the terms of the order approving the Plan to pursue all litigation necessary to fund the Plan to pay creditors in full;

(2) that if the Debtor defaults in any terms of the Plan, the court upon hearing after notice to Debtor, the creditors and such other persons as the court may direct, may enter an order either adjudging the Debtor bankrupt or directing the bankruptcy be proceeded with pursuant to the provisions of the Bankruptcy Code, as

amended, or dismissing the proceedings, whichever in the opinion of the court may be in the best interest of creditors, and the amounts of all claims shall be reinstated in their allowed amount, crediting only payments received thereon.

* * *

DISTRIBUTION OF CONSIDERATION

* * *

In the event that the order on confirmation does not become final and conclusive upon the expiration of the time within which the parties in interest may appeal from the order of the Bankruptcy Court on confirmation:

(1) the assets of the estate shall continue to be under the jurisdiction of the court and shall not be revested in Debtor[.]

* * *

Maxfield Parrish
DAYBREAK
5534 - 10½"x18" (27x46 cm)
7977 - 17¾"x29¾" (45x75 cm)

(2)

No. 98-542

FILED

OCT 30 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

DARREL D. SMITH,

Petitioner,

vs.

JOHN PETER LEE, LTD., TOM GRIMMETT,
Chapter 7 Trustee,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JOHN PETER LEE, LTD.

JOHN PETER LEE
Counsel of Record
NANCY L. ALLF
PAUL C. RAY
TIMOTHY P. THOMAS
JOHN PETER LEE, LTD.
Attorneys for Respondent John Peter Lee, Ltd.
830 Las Vegas Boulevard South
Las Vegas, Nevada 89101
(702) 382-4044

149397

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

31 pp

STATEMENT PURSUANT TO RULE 29.6

Respondent, John Peter Lee Ltd., has no parent companies and no nonwholly owned subsidiaries.

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APPENDIX

Appendix A — Debtor's Third Plan Of Reorganization 1a

STATEMENT OF THE CASE

Respondent John Peter Lee, Ltd. objects to Smith's misrepresentation of the relevant facts outlined herein. Petitioner, Darrel D. Smith, filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in 1991. On January 11, 1994, the United States Bankruptcy Court, District of Nevada, entered an order confirming Smith's Third Plan of Reorganization ("Plan").

The Plan provided for two alternative means of funding the claims against the Plan. The first means of funding the Plan was a litigation claim by Smith, which he estimated to be "conservatively worth at least $9,000,000". Page 2a, *infra*.

The second alternative means of funding payment of the claims under the Plan was

> by making reproductions and prints of Maxfield Parrish's painting *Daybreak*, which [Smith] owns, with all profits after payment of production costs and debtor's living expenses to fund the Plan.

Page 2a. If neither of the first two alternative sources of funding were adequate within a specific time, Smith could only fund the Plan by selling *Daybreak*.

A. Smith Defaulted Under His Reorganization Plan.

Smith's two alternative sources of funding the Plan failed. First, Smith's litigation yielded only a judgment of $80,000, far short of the amount required to fund the Plan, which required in excess of $1,000,000. Second, the debtor gave up on any ostensible efforts to sell prints of *Daybreak* because such sales were not likely to ever return a net profit after expenses. Further, Smith then became unwilling to sell *Daybreak* to fund the Plan.

B. The Bankruptcy Court Converted The Case Under The Plan Provisions And Under The Conversion Statute.

Smith's Plan specifically authorized the court to convert his case if he defaulted on the Plan by providing at Section (e)(2) of the Plan under the Section entitled, "Conditions":

> (2) that if the Debtor defaults in any terms of the Plan, the court upon hearing after notice to Debtor, the creditors and such other persons as the court may direct, may enter an order either adjudging the Debtor bankrupt or directing the bankruptcy be proceeded with pursuant to the provisions of the Bankruptcy Code, as amended, or dismissing the proceedings, whichever in the opinion of the court may be in the best interest of creditors, and the amounts of all claims shall be reinstated in their allowed amount, crediting only payments received thereon.

Page 3a. When Smith defaulted, this conversion provision of his Plan became effective.

The bankruptcy court converted Smith's Chapter 11 case to Chapter 7 pursuant to 11 U.S.C. § 1112(b) on February 6, 1996. On February 16, 1996, the bankruptcy court ordered the sale of *Daybreak* at public auction. The bankruptcy court provided for appropriate commission and sales arrangements by the Chapter 7 Trustee and set a $1.5 million reserve for the payment of creditors' claims.

The bankruptcy court ordered the conversion and subsequent sale of *Daybreak* because of Smith's failure to implement his Plan. Although Smith had no other alternative means of funding the Plan, he wanted to wait to sell the painting

and argued that his creditors must wait for payment. He took the position that the Plan imposed no good faith obligation of diligence upon him and that he was free to indefinitely delay the sale of the painting.

The bankruptcy court correctly recognized that Smith failed to fund the Plan through his first two alternatives and that the sale of the painting was the only remaining alternative. The bankruptcy court also correctly recognized that the timing was right to maximize the sale price of the painting.

C. Smith Has Now Accepted The Benefits Of The Conversion Order.

The painting sold at auction for $3.9 million, net of buyer's premium and applicable city and state taxes. Although Smith has vigorously argued against the bankruptcy court's legal grounds for ordering the sale, Smith has gladly accepted the benefits of the successful sale, which far exceeded expectations.

Smith has since received the court's permission to spend from estate assets hundreds of thousands of dollars of sale proceeds to purchase another Parrish painting and to fund his multiple fronts of litigation. Smith has accepted the benefits of the sale on the premise that a surplus exists.

Smith could not pay the purchaser back if the conversion were reversed because Smith has already spent the money. He never appealed the order allowing the sale to occur. According to the bankruptcy trustee as of October 26, 1998, only $317,000 remains in the estate. All parties have relied upon the finality of the sale. Essentially, Smith argues a set of legal niceties of dubious merit, but Smith does not have any legal basis to overturn the sale. The only practical issue is how to distribute the proceeds.

Smith argues that he should control the distribution instead of a trustee, claiming the painting never became an asset of the Chapter 7 estate. Smith ignores the plain language of his Plan plus the fact that he would now still have to pay the creditors the same amount for their claims and the Chapter 7 Trustee the same amount for his court-ordered services as a collections and disbursements agent of the $3.9 million proceeds.

In short, Smith argues no damage caused him by the sale which has benefitted him tremendously, because he will receive the surplus once all creditors are paid. Smith shows the wisdom of the bankruptcy court's prohibition against his handling the sale proceeds because Smith seeks only to control the funds for his benefit without regard to the rights of creditors whose rights to the sale proceeds have legal priority over his own.

On Smith's appeal of the bankruptcy court's conversion order, the United States District Court, District of Nevada, affirmed the conversion on the grounds of 11 U.S.C. § 1112(b)(7), (8) and (9). *In re: Smith*, 201 B.R. 267 (D. Nev. 1996). On March 20, 1998, the United States Court of Appeals for the Ninth Circuit affirmed the district court in an unpublished memorandum decision.

Smith claims $300,000 of negative tax consequences from the Trustee's handling of the sale proceeds, but Smith has not provided proof or explanation for his claim. Smith also implies some type of harm resulting to him from the Trustee's holding of the asset, but Smith alleges no mismanagement of the asset. The legal fees incurred result from Smith's own decision to litigate his bankruptcy continuously for two years after he and all other parties have changed positions in reliance upon the validity of the sale of *Daybreak* by the Chapter 7 Trustee. This is the eighth appeal Smith has filed against John Peter Lee, Ltd. He has also appealed other decisions of the bankruptcy court in addition.

Smith has accepted the benefits of the Order from which he is appealing. Without that Order, the Trustee could not have sold *Daybreak* or received the $3.9 million sale proceeds. Smith has accepted more than $200,000 of the sale proceeds to pay his present counsel's fees. Smith has also obtained court authorization for the purchase of another Maxfield Parrish painting for some $235,000.

REASONS FOR DENYING THE WRIT

I.

THE LOWER COURTS CORRECTLY CONVERTED SMITH'S CASE BASED UPON THE PLAIN MEANING OF THE STATUTE AND OF THE PLAN PROVISION APPLICABLE TO SMITH'S DEFAULT.

Smith failed to implement the Plan. First, his litigation failed. Then he failed to diligently pursue the reproduction and sales of *Daybreak* prints to fund the Plan even after given three attempts over eight months by the bankruptcy court. His actions constituted grounds for conversion.

11 U.S.C. § 1112(b) states in pertinent part as follows:

> . . . The court may convert a case [under Chapter 11] to a case under Chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including — * * *
>
> (7) Inability to effectuate substantial consummation of a confirmed plan;
>
> (8) Material default by the debtor with respect to a confirmed plan. . . .

These subsections justify the bankruptcy court's conversion of Smith's case. *In re: Smith*, 201 B.R. at 271.

When Smith obtained his $80,000 judgment, he failed under his first manner of funding the Plan through litigation. He has since lost an appeal of the $80,000 Judgment at the Supreme Court of Nevada. When Smith failed to diligently pursue the making and selling of reproductions and prints of *Daybreak*, Smith failed under the second manner of funding required by the Plan. These are the only means of funding and implementing the Plan which Smith provided. His failure in these respects is an "inability to effectuate substantial consummation of a confirmed Plan" within the meaning of 11 U.S.C. § 1112(b)(7).

Smith's failure to fund the Plan is likewise a "material default by the debtor with respect to a confirmed Plan" within the meaning of 11 U.S.C. § 1112(b)(8). Smith's failure to fund the Plan under his two alternative means specified in the Plan, is statutory grounds for conversion. The Plan provision quoted above in the Statement of the Case also provided specifically for conversion in the event of Smith's default. The Court of Appeals and the district court correctly affirmed the bankruptcy court's conversion of the case to Chapter 7.

Smith incorrectly argues through a convoluted series of cross-referencing between Bankruptcy Code sections that the bankruptcy court cannot convert a Chapter 11 case where a Plan has been confirmed. Smith's argument would make a nullity of 11 U.S.C. § 1112(b)(7) and (8). The statutes should be read according to their plain meaning and not in self contradiction to their express terms. *E.g.*, *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 109 S. Ct. 1026 (1989). The lower courts correctly ruled that Smith's actions created grounds for conversion and that 11 U.S.C. § 1112(b) authorized the conversion of Smith's Chapter 11 case.

II.

THE COURTS OF APPEALS ARE NOT IN CONFLICT WITH THE DECISION BELOW.

Smith cites no decision from any of the circuit courts of appeal rejecting, conflicting, attacking or even considering the reasoning of the Ninth Circuit Court of Appeals for affirming the conversion of Smith's case. None of the cases suggest conversion to be groundless here where the debtor is in default of the Plan, where the bankruptcy court approved the sale of the primary asset contemplated to fund the Plan and where the debtor has accepted the benefits of the sale.

Smith essentially argues that he had no good faith duty of diligence to fund his Plan but could delay payments of creditors with impunity under the maximum, contingent sixty (60) month payment provision of his Plan, regardless of the increasing accrual of risk of inability to pay creditors. The lower courts in this case each correctly interpreted the Plan to require Smith's good faith efforts to fund the Plan.

Smith's argument that statutory conversion does not exist flies in the face of logic and the plain meaning of 11 U.S.C. § 1112(b). Smith admits at page 27 of his Petition that numerous courts provide for the vesting of assets in the new Chapter 7 estate upon conversion and that reorganization plans can expressly provide for conversion. Notably, Smith does not suggest any purpose for the statute. If his theory were correct, conversion would be impossible in a case such as this, where the debtor defaults under his Plan.

As the district court below correctly stated concerning the bankruptcy court's power to convert this case:

> The bankruptcy court is given wide discretion to convert a Chapter 11 case to Chapter 7 for cause, and such a conversion is reviewed under an abuse of discretion standard. *Johnston v. Gem Development Co.*, (*In Re: Johnston*) 149 Bankr. 158, 160 (9th Cir. BAP Nev. 1992). Legislative history indicates that cause is broadly defined, allowing a court to "consider other factors as they arise, and to use its equitable powers to reach an appropriate result in individual cases." *H.R. Rep. No*, 595, 95th Cong., 1st Sess. 405, N.1 at 405-06 (1977).

In Re: Smith, 201 Bankr. at 270. Here the bankruptcy court reached the appropriate result and did not abuse its discretion in the exercise of its equitable powers by converting Smith's case following his default under the Plan.

The holdings of the circuit cases Smith cites do not support his position. The two circuit court of appeals cases Smith discusses, *Harstad v. First American Bank*, 39 F.3d 98 (8th Cir. 1994) and *In Re: Chattanooga Wholesale Antiques, Inc.*, 930 F.2d 458 (6th Cir. 1991), do not conflict with the Ninth Circuit Court of Appeals' decision below.

Harstad was not a conversion case. The Eighth Circuit Court of Appeals there ruled that the plan which did not there provide for retention of preferential transfer avoidance powers following confirmation did not allow the debtor to pursue any such avoidance actions. The instant case does not involve any avoidance powers but is a conversion case.

The one remote similarity between the instant case and the facts of *Harstad* is that both courts followed plan provisions concerning the allowance or disallowance of proposed means of funding the plan. In *Harstad*, the plan did not allow pursuit

of the avoidance powers. In the instant case, the plan did allow for sale of *Daybreak* when the other means of funding failed. Although the facts of *Harstad* are largely dissimilar to the instant case, the holding does not conflict with the Ninth Circuit Court of Appeals' ruling in this case.

Smith incorrectly argues the rulings below to conflict with the holding of *Chattanooga Wholesale Antiques, Inc., supra.* Smith makes his argument by referencing only part of the holding concerning the trustee's lack of power after conversion of the Chapter 11 case to avoid post-confirmation transfers. The rest of the court's holding directly contradicts Smith's assertion that the trustee has no power over the estate. After conversion, concerning a pre-confirmation, preferential transfer to a bank, the court stated:

> The bankruptcy court held that this payment was authorized under Section 549(a). The district court reversed this order and held that the trustee was entitled to recover the payment as an unauthorized transfer of estate property after commencement of the bankruptcy case. We agree with the district court.
>
> . . . No order of the court authorized this payment. . . . Likewise, no provision of the bankruptcy code authorized the payment. [A contrary holding] would clothe the debtor with power to treat unsecured creditors differently. Such a holding would run counter to one of the fundamental purposes of bankruptcy — equal treatment of unsecured creditors.

930 F.2d at 465. The court held that the trustee had avoidance power under 11 U.S.C. § 549 to recover the asset belonging to the converted Chapter 7 estate.

Like *Harstad, Chattanooga Wholesale Antiques, Inc.* focuses upon transfer avoidance powers, which is not an issue in the instant case. To the degree this Sixth Circuit case is comparable to the instant case, it is not in conflict because it recognizes the trustee's power over the estate following conversion.

The Sixth Circuit opinion also weighs the factor of prior court allowance of the action at issue. In the instant case, the bankruptcy court confirmed the Plan which gave the court continuing power over *Daybreak* and specifically contemplated the sale of *Daybreak* in the event the primary intended means of funding the Plan failed. Though the facts of *Chattanooga Wholesale Antiques, Inc.* are distinguishable, the allowance of the trustee's post-conversion avoidance powers over the estate is consistent with the rulings of the courts below in the instant case and is not in conflict with the Ninth Circuit Court of Appeals.

Smith does not discuss in detail the other circuit courts of appeals' opinions he cites. Instead, he uses partial explanations from dicta to overgeneralize from a complex series of loose analogies and poorly analyzed string citations of cases. The cases he cites, discussed below, have dissimilar fact patterns, procedural settings and legal issues from the present case.

Smith largely ignores the factual and procedural differences among the cases he cites. One of Smith's cited cases, *Bank of Louisiana v. Pavlovich*, (*In Re: Pavlovich*), 952 F.2d 114, 116 (5th Cir. 1992), explains the nature of Smith's problem of overgeneralizing broad bankruptcy law principles from dissimilar cases as follows:

> With some trepidation, we venture into analysis of the impact of a confirmed plan of reorganization

> upon a subsequent conversion to Chapter 7. In each such case, much depends on procedural nuances.

Pavlovich involved the issue of discharge and did not focus upon the standard of conversion, which Smith argues to have been improperly applied in the instant case. Thus, although Smith cites this Fifth Circuit Court of Appeals' case, it is largely unhelpful by its own terms in resolving the instant case and its far different procedural issues.

The same is largely true of the cases Smith cites. For example, many of Smith's cases provide no helpful analysis of the law of conversion of bankruptcy cases. E.g., *In Re: Continental Airlines*, 91 F.3d 553 (3rd Cir. 1996); *DeLaurentiis Entertainment Group, Inc.*, 963 F.2d 1269 (9th Cir. 1992), *cert. den.*, 505 U.S. 918 (1992); *Department of Air Force v. Carolina Parachute Corp.*, 907 F.2d 1469 (4th Cir. 1990); *Hillis Motors, Inc. v. Hawaii Automobile Dealers Assoc.*, (*In Re: Hillis Motors, Inc.*), 997 F.2d 581 (9th Cir. 1993); *In Re: Orange Tree Associates*, 961 F.2d 1445 (9th Cir. 1992); *In Re: Penrod*, 50 F.3d 459 (7th Cir. 1995); *Riverside Nursing Home v. Northern Metropolitan Residential Health Care Facility, Inc.*, 977 F.2d 78 (2nd Cir. 1992). Smith cited all of these cases in his effort to argue a conflict to exist among the circuits concerning his red herring theories of vesting at confirmation, but conversion is not at issue in these cases. They are inapplicable.

Of the other circuit court of appeals cases Smith cites, *Goodman v. Phillip R. Curtis Enterprises*, 809 F.2d 228 (4th Cir. 1987) focuses upon plan modification and implementation rather than conversion. In *Laing v. A.G. Johnson* (*In Re: Laing*), 31 F.3d 1050 (10th Cir. 1994), the court focused upon dischargeability in a converted case where prior to conversion the debtor had waived all defenses concerning dischargeability. These cases are inapplicable and do not conflict with the Ninth Circuit Court of Appeals' ruling below.

Paul v. Monts, 906 F.2d 1468 (10th Cir. 1990), another of Smith's cases, is highly consistent with the ruling below in this case. In *Paul*, the trustee liquidated the assets following conversion, as occurred in the instant case. The court acknowledged the non-exclusive nature of remedies available to creditors where a debtor such as Smith defaults under his Plan, consistent with the ruling below of the instant case.

The correctness of the conversion was not at issue in the converted Chapter 13 case of *Security Bank v. Neiman*, 1 F.3d 687 (8th Cir. 1993). The court joined "the line of cases holding the estate continues to exist after confirmation of the Chapter 13 plan." 1 F.3d at 690. Like the other cases Smith cites, the facts are dissimilar, but comparison to the instant case tends to support the reasoning of the courts below in this case and not at all to conflict with the Ninth Circuit Court of Appeals' ruling.

Finally, the last court of appeals case listed in Smith's Table of Authorities, *Vogel v. Russell Transfer, Inc.*, 852 F.2d 797 (4th Cir. 1988), recognized the trustee's avoidance powers after conversion but restricted the powers from reaching transfers specifically authorized by the court. In passing, the court rejected the same argument Smith makes, that no estate remains after conversion, describing the argument as "odd" as follows:

> The trustee makes an odd argument concerning Section 549 [the trustee's avoidance power]. He argues that it does not apply because following confirmation of the Chapter 11 plan, there is no estate so that the transfer of the security interests [sought to be avoided], as dated by the perfection, was not property "of the estate." . . . The inapplicability of Section 549 does not help the trustee; it means that the trustee must look for another source for his claimed power.

852 F.2d at 800-01. *Vogel* does not adopt Smith's argument but notes that it is "odd".

No conflict exists among the circuit courts of appeals concerning the reasoning of the Ninth Circuit Court of Appeals and the courts below. Smith misstates the law of each of these circuit courts of appeals by trying to create a conflict among the circuits where none exists. The reasons for granting a petition for writ of certiorari are absent under Supreme Court Rule 10.

III.

SMITH MISREPRESENTS THE IMPORTANCE OF THE ISSUES HE IDENTIFIES.

This Court need not micro-manage alleged splits of authority among lower courts not yet analyzed by the circuit courts of appeals. Smith's citation of lower court decisions contains similar problems as his citations to the circuit courts of appeals. The cases do not address the factual, procedural and substantive legal issues present in this case. As he did below, Smith relies heavily upon *T.S.P. Industries*, 117 B.R. 375 (Bankr. N.D. Ill. 1990), for his contention that conversion was improper in the instant case.

T.S.P. Industries is a bankruptcy court case. It does not provide a detailed specification of the Chapter 11 plan at issue in that confirmation case. The *T.S.P. Industries* court acknowledged broad discretion in the bankruptcy court to a converted Chapter 11 case following plan confirmation. The court also acknowledged that after conversion of a Chapter 11 case, the Chapter 7 trustee holds avoidance powers over preferential or fraudulent conveyances. As the district court below in this case stated as to *T.S.P.*:

> The [*T.S.P. Industries*] court gave no explanation as to why Section 541 did not vest the [avoidance powers for preferential or fraudulent conveyances] in the debtor in such a situation. The court also failed to explain why an estate survived confirmation of a plan *only* when fraud occurred before the estate was created and no significant assets existed at the time of conversion. . . . The court provided no legal precedent or Congressional support for allowing specific language in an individual plan to override Section 541, which vests the property in the debtor upon confirmation of a plan.
>
> The *T.S.P.* court's analysis would virtually eliminate the power of courts to convert confirmed plans, a power which is expressly granted in Section 1112(b)(7-9), and it would grant courts the power to nullify the revesting of the estate in the debtor under Section 541 by explicitly retaining jurisdiction over a particular plan. This Court will not change the statutory power of a court to convert under Section 1112(b)(7-9) in such a drastic manner without a finding of Congressional intent.

Smith, 201 Bankr. at 273-74. Like the problem described in *Pavlovich*, *supra*, the *T.S.P. Industries* opinion is difficult to apply to other cases because the opinion does not include a specific description of the plan of reorganization and its factual setting. The district court below in this case correctly rejected the application of *T.S.P. Industries* to the facts of the instant case.

Smith lists a number of lower court cases in his footnote 13 in conjunction with his argument concerning *T.S.P.* These cases acknowledge the existence of a Chapter 7 estate upon conversion. The cases contradict Smith's theory that a Chapter

7 trustee allegedly has no estate to administer after a conversion of a Chapter 11 case where a plan is confirmed.

Smith misrepresents that the conversion is allegedly likely to consume resources which otherwise would benefit creditors. In this case, the only expenses involve Smith's litigation about a theory which does not apply in this case. Creditors do not benefit from Smith's litigation because this is a surplus case. The court has approved the sale of *Daybreak*, and Smith has sought and obtained court approval to pay creditors. Smith's contentions concerning alternative legal theories would not change the ultimate result. The sale is now final, and full payment of the funds must proceed.

IV.

SMITH SHOWS HIS OWN ARGUMENTS TO BE INSUBSTANTIAL BY CONCEDING THAT ALTERNATIVE AUTHORITY, 11 U.S.C. § 1142, ALLOWS THE SAME RESULT AS THE BANKRUPTCY COURT REACHED BELOW.

Smith cites no circuit court of appeals authority for his proposition that the Ninth Circuit Court of Appeals erred as to the necessity of the specific plan language to override the vesting provisions of 11 U.S.C. § 1141. Instead, Smith argues that the alternative basis for relief available under 11 U.S.C. § 1142 allegedly negates the statutory authority of the conversion statute of 11 U.S.C. § 1112(b). 11 U.S.C. § 1142 states:

> **Implementation of plan**
>
> (a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity

> organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.
>
> (b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

The fact that an alternative, undisputed basis exists to reach the same result as the bankruptcy court reached below does not mean the bankruptcy court erred. The existence of an alternative basis for the same relief shows the bankruptcy court unquestionably had authority to sell the painting and that the entire statutory scheme is consistent with the bankruptcy court's rulings. The *Goodman* and *Riverside Nursing Home* cases, *supra*, cited by Smith, confirm that the bankruptcy court has authority to enforce confirmed reorganization plans which are in default such as in Smith's case.

Smith also cites *Hillis* and *Paul*, *supra*. These cases are consistent with the Ninth Circuit Court of Appeals ruling below in allowing the bankruptcy court to exercise its jurisdiction to enforce provisions of a confirmed plan after conversion. Smith's cases at most show alternative grounds for reaching the same result. None of Smith's cited cases bar conversion under a defaulted plan, nor do they bar the exercise of bankruptcy court jurisdiction over the sale of an asset consistent with the terms of a confirmed plan.

Smith defaulted under the Plan. The bankruptcy court converted the case and ordered the painting sold. Smith does

not dispute the bankruptcy court's ultimate authority to do so, but Smith quibbles over meritless, complex legal theories and niceties. His arguments are meritless and unimportant for this Court to address in detail. The Court should deny his Petition.

V.

THE ISSUES SMITH PRESENTS ARE MOOT, AND THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Smith has accepted the benefits of the conversion order. Without the conversion order, the trustee could not have sold the painting. Smith has spent the sale proceeds on attorney's fees, new appeals and on the purchase of another Parrish painting.

One of Smith's cited cases, *In Re: Continental Airlines*, 91 F.3d 553 (3rd Cir. 1996) describes the doctrine of equitable mootness applied in bankruptcy cases such as this as follows:

> . . . Continental invokes the broader interpretation of mootness applied in bankruptcy cases, often referred to as "equitable mootness." Under this widely recognized and accepted doctrine, the courts have held that "an appeal should . . . be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable."

91 F.3d at 558-59 (citations of cases from the First, Second, Fourth, Fifth, Seventh, Ninth, Eleventh and D.C. Circuit Courts of appeals omitted). Equitable mootness refers to the discretionary balancing of equitable and prudential factors rather than the limits of the federal courts' authority under Article III of the Constitution. *Id.* at 560.

The Third Circuit Court of Appeals further explained:

> The factors that have been considered by courts in determining whether it would be equitable or prudential to reach the merits of a bankruptcy appeal include (1) whether the reorganized plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgment.

91 F.3d at 560. Because the case has been converted, the third and fifth factors apply.

Because Sotheby's sold the painting at public auction by court order, the purchaser and all other parties have relied upon the sale. Indeed, the transfer of title to *Daybreak* was never stayed. The outcome of this appeal is not likely to materially affect the remaining administration necessary in this case. The sale proceeds have already been collected, and the remainder must be disbursed and an accounting submitted. The Trustee will be responsible for the accounting regardless of how this Court were to rule on Smith's Petition, even if the Court were to require the exercise of additional equitable powers to reverse all of the transactions undertaken over the past two years in reliance upon the sale of *Daybreak*.

Smith cannot guarantee that all of the transactions can be reversed. The prospect of reversing all such transactions would be impractical at best and highly inequitable. The bankruptcy court correctly converted the case and ordered the sale of *Daybreak*. Smith has accepted and enjoyed the benefits of the sale. His Petition should be denied.

CONCLUSION

John Peter Lee, Ltd. respectfully requests this Honorable Court to enter an order denying Smith's Petition for Writ of Certiorari.

Respectfully submitted,

JOHN PETER LEE
Counsel of Record
NANCY L. ALLF
PAUL C. RAY
TIMOTHY P. THOMAS
JOHN PETER LEE, LTD.
Attorneys for Respondent
John Peter Lee, Ltd.
830 Las Vegas Boulevard South
Las Vegas, Nevada 89101
(702) 382-4044

APPENDIX A — DEBTOR'S THIRD PLAN OF REORGANIZATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

Case No. BK-S-91-01026-RCJ
Chapter 11

DATE: November 23,1993
TIME: 11:00 am.

In Re

DARREL D. SMITH,

Debtor.

DEBTOR'S THIRD PLAN OF REORGANIZATION

* * *

MEANS OF FUNDING AND IMPLEMENTING THE PLAN

The Debtor has two means upon which to fund his Plan of Reorganization, litigation and making and selling prints of the painting *Daybreak*, which he owns.

Debtor filed a complaint in District Court for Clark County, Nevada against Edward M. Doumani and his family on August 24, 1990. That Complaint will declare the rights of Smith and the Doumani family and whether his now ex-wife Mitzi's purported "transfer" to Edward M. Doumani ("Doumani") of her interest in the Tropicana Hotel & Casino in 1984 was valid. Trial is scheduled to commence on or about October 25, 1993.

Appendix A

The first manner for funding the Plan is the obtaining of a judgment in state court and litigation and collection of claims against Edward M. Doumani, Deil O. Gustafson ("Gustafson"), Lindquist & Vennum and John S. Jagiela in litigation pending in this court. Debtor believes that these claims are conservatively worth at least $9,000,000 to him alone, based upon funds improperly received by Doumani and Gustafson in proceeds of litigation involving Hotel Conquistador, Inc. and Ramada Resorts, Inc. ("Ramada").

The second manner in which Debtor can fund the Plan is by making reproductions and prints of Maxfield Parrish's painting *Daybreak*, which he owns, with all profits after payment of production costs and Debtor's living expenses to fund the Plan. No projection concerning the costs or profit to the estate is possible at this time, but Debtor will undertake all reasonable efforts to publish and market reproductions of the painting.

* * *

CONDITIONS

(d) *Continuing Jurisdiction*. After confirmation the court shall continue to retain exclusive jurisdiction over these proceedings until the provisions of the Plan have been fully performed for the following purposes:

(1) for determining the amount of any claims of security interest made by John O. Chatt;

(2) for determining the terms upon which the Debtor may further borrow from John O. Chatt;

(3) for resolving disputes relating to claims which have been filed but are disputed;

(4) for receiving and determining applications related to the Plan;

(5) for determining the dischargeability of certain debts of any creditors having standing who make timely application after confirmation;

(6) supervising the enforcement of the Plan; and

(7) for such other purposes as the court shall determine.

(e) *Additional Provisions Consented to by Debtor.* In addition to the foregoing, Debtor consents to the following provisions and consents to their inclusion in any order of the court, including the order confirmation:

* * *

(2) that if the Debtor defaults in any terms of the Plan, the court upon hearing after notice to Debtor, the creditors and such other persons as the court may direct, may enter an order either adjudging the Debtor bankrupt or directing the bankruptcy be proceeded with pursuant to the provisions of the Bankruptcy Code, as amended, or dismissing the proceedings, whichever in the opinion of the court may be in the best interest of creditors, and the amounts of all claims shall be reinstated in their allowed amount, crediting only payments received thereon.

Appendix A

* * *

DATED this 20 day of October, 1993.

JOHN PETER LEE, LTD.

By: (signed)
NANCY L. ALLF
Nevada Bar No. 000128
830 Las Vegas Boulevard South
Las Vegas, Nevada 89101

(signed)
Darrel D. Smith

(3)

Supreme Court, U.S.
FILED
OCT 30 1998
CLERK

No. 98-542

In The

Supreme Court of the United States

October Term, 1998

DARREL D. SMITH,

Petitioner,

vs.

JOHN PETER LEE, LTD. and
TOM GRIMMETT, Chapter 7 Trustee,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT TOM GRIMMETT, TRUSTEE

N. Patrick Flanagan
Counsel of Record
Lenard E. Schwartzer

HALE LANE PEEK DENNISON
HOWARD AND ANDERSON
Attorneys for Respondent
Tom Grimmett, Trustee
2300 West Sahara
Suite 800
Las Vegas, Nevada 89102
(702) 362-5118

149399

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

33pp

QUESTIONS PRESENTED

1. Whether the provisions of Smith's plan provided that Smith's property did not revest in him upon confirmation of his plan of reorganization.

2. Whether the Ninth Circuit erred under 11 U.S.C. § 1112(b) in affirming the conversion of Smith's chapter 11 case to one under chapter 7 and vesting Smith's assets into a chapter 7 estate.

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RELEVANT STATUTES

11 U.S.C. § 348. Effect of conversion.

(a) Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.

(b) Unless the court for cause orders otherwise, in sections 701(a), 727(a)(10), 727(b), 728(a), 728(b), 1102(a), 1110(a)(1), 1121(b), 1121(c), 1141(d)(4), 1146(a), 1146(b), 1201(a), 1221, 1228(a), 1301(a), and 1305(a) of this title, "the order for relief under this chapter" in a chapter to which a case has been converted under section 706, 1112, 1208, or 1307 of this title means the conversion of such case in such chapter.

(c) Sections 342 and 365(d) of this title apply in a case that has been converted under section 706, 1112, 1208, or 1307 of this title, as if the conversion order were the order for relief.

. . . .

(f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title —

> (A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion; and
>
> (B) valuations of property and of allowed secured claims in the chapter 13 case shall apply in the converted case, with allowed secured claims reduced to the extent that they have been paid in accordance with the chapter 13 plan.

> (2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property in the converted case shall consist of the property of the estate as of the date of conversion.

STATEMENT OF THE CASE

Darrel D. Smith ("Smith") filed for relief under chapter 11 of the Bankruptcy Code on or about March 22, 1991. An Order Confirming Debtor's Third Plan Of Reorganization (the "Plan") was entered on January 11, 1994. Smith's means for funding the Plan was: (1) litigation against the Doumani family for an interest in the proceeds from the sale of the Tropicana Hotel and Casino, and (2) the making and selling of prints of the painting *Daybreak* by the artist Maxfield Parrish, the original being owned by Smith. The Plan provided, in relevant part, that only

> If, sixty (60) months after confirmation, creditors are not substantially paid, or if the Debtor loses both litigations and there is insufficient profit from print[s] of *Daybreak* to pay all claims, the Debtor will arrange to sell or auction *Daybreak* to pay creditors. . . .

P. 39a of Petition For Writ Of Certiorari ("Petition").

On March 31, 1995, John Peter Lee, Ltd. ("Lee") moved to withdraw as Smith's counsel. The Bankruptcy Court granted Lee's motion to withdraw. Lee also moved to convert Smith's chapter 11 case to a case under chapter 7 and to require the sale of Smith's bankruptcy estate assets, particularly the painting *Daybreak*. On May 1, 1995, the court held a preliminary hearing on the motion to convert. The Bankruptcy Court denied Lee's motion without prejudice and set a status hearing for October 3, 1995. At this hearing, the Bankruptcy Court stated that Smith could not use the litigation as his sole source of payment but must produce prints of *Daybreak*. A second status hearing was set for October 24, 1995, to allow Smith to show that he was not in default of the Plan. At the October 24 hearing, the Bankruptcy Court ordered Smith to show, at a third hearing on January 23, 1996, that he had made "reasonable efforts to start producing prints and marketing them." The Bankruptcy Court also warned Smith that it would convert the case to one under chapter 7 if Smith had not made such efforts.

At the January 23, 1996 hearing, the Bankruptcy Court found that Smith had not made reasonable efforts to sell and market prints of *Daybreak* and granted Lee's motion to convert pursuant to 11 U.S.C. § 1112(b)(7) and (8). The court ordered that Smith's case be converted to one under chapter 7 and that a trustee be appointed. On February 6, 1996, an Order To Convert Case To Chapter 7 was filed. Tom R. Grimmett, Trustee (the "Trustee") was duly appointed as the chapter 7 trustee in Smith's case. Smith moved for reconsideration. The court denied this motion and stated that it rejected the holding of *In re T.S.P. Indus., Inc.*, 117 B.R. 375 (Bankr. N.D. Ill. 1990), and similar holdings, that postconfirmation conversion is not appropriate when the chapter 11 estate's assets have revested in the debtor. Pp. 29a-30a of Petition. Instead, the Bankruptcy Court held that "property of an estate does revest in the Debtor upon confirmation." However, when a chapter 11 case is converted to a chapter 7 case, the revested property "does become property of an estate, a Chapter 7 estate." P. 30a of Petition.

Smith appealed the Bankruptcy Court's order converting his case. The United States District Court for the District of Nevada affirmed. P. 9a of Petition. The District Court also rejected *T.S.P. Industries* and held that postconfirmation conversion is appropriate even when property of the debtor has revested in the debtor. The District Court stated that otherwise, "[a] debtor could . . . materially default or lose all ability to effectuate a plan and creditors would be entirely without remedy." P. 24 a of Petition.

Smith appealed the District Court's decision, and the Ninth Circuit affirmed. However, the Ninth Circuit affirmed based upon the provisions of Smith's Plan, grounds other than those cited by the lower courts. Applying its prior decision in *Hillis Motors, Inc. v. Hawaii Auto. Dealers Ass'n*, 997 F.2d 581 (9th Cir. 1993), the Ninth Circuit held that the provisions of Smith's Plan dictated that Smith's property, including *Daybreak*, did not revest in him upon confirmation.

In the meantime, the Trustee obtained authorization to sell Smith's largest asset, *Daybreak*, by auction at Sotheby's. *Daybreak* was sold at auction for approximately $3,900,000, and the proceeds from *Daybreak* netted Smith's estate approximately $3,700,000. This sum has been sufficient to pay all creditors in full with interest, and leave a substantial amount for distribution to Smith.

SUMMARY OF ARGUMENT FOR DENYING THE PETITION

Smith's petition for writ of certiorari should be denied because: 1) the Ninth Circuit's decision was based upon the specific facts and provisions of Smith's Plan; and 2) although there is conflicting case law with regard to the issue of whether upon conversion of a confirmed chapter 11 case to a case under Chapter 7, property of the debtor becomes property of the chapter 7 estate, this issue is not one of substantial importance.

REASONS FOR DENYING THE PETITION

Smith's petition should be denied because the Ninth Circuit based its holding upon the particular facts in the case before it. Specifically, the Ninth Circuit held that the provisions of Smith's Plan provided that *Daybreak* did not revest in Smith upon confirmation. As a result, when Smith's chapter 11 case was converted to one under chapter 7, *Daybreak* was included as part of Smith's chapter 7 estate.

Alternatively, the petition should be denied because, although there is conflicting case law with regard to the issue of whether upon conversion of a confirmed chapter 11 case to a case under Chapter 7, property of the debtor becomes property of the chapter 7 estate, this issue is not one of importance because the provisions of a plan can expressly determine the effect of conversion upon property of a debtor. Furthermore, Congress, if necessary, can resolve any confusion more effectively by amending the applicable statutes.

I.

THIS COURT SHOULD DENY THE PETITION BECAUSE THE NINTH CIRCUIT'S HOLDING IS BASED UPON THE PARTICULAR PROVISIONS OF SMITH'S CHAPTER 11 PLAN.

Smith contends that the bankruptcy court did not have jurisdiction over his assets after confirmation of his Plan pursuant to 11 U.S.C. § 1141(b) and (c) because confirmation of his plan vested all of his property in him free and clear of all intervening interests, and his Plan did not expressly provide otherwise. As a result, Smith asserts that because *Daybreak* vested in him upon confirmation of the Plan, the court did not have the authority to vest *Daybreak* in his chapter 7 estate.

Contrary to Smith's contentions, the Ninth Circuit found that the provisions of Smith's Plan provided that Smith's property did not revest in Smith upon confirmation. The Ninth Circuit's holding was based upon the plain meaning of 11 U.S.C. § 1141 and a prior decision, *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 589 (9th Cir. 1993).

A. The Plain Meaning Of 11 U.S.C. § 1141 Does Not Require That Express Provisions Exist To Prevent Revesting.

Smith contends that to prevent revesting of property in a debtor upon confirmation under 11 U.S.C. § 1141, a plan must expressly provide that property will not revest in the debtor upon confirmation. However, the plain meaning of 11 U.S.C. § 1141(b) does not require that a plan contain express provisions preventing revesting.

The "fundamental cannon [of] statutory interpretation begins with the language of the statute itself." *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 110 S. Ct. 2126 (1990). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 112 S. Ct. 1146, 1149 (1992). If the statutory language is ambiguous, a court must then resort to examination of legislative history. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 109 S. Ct. 1026, 1030 (1989).

> The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters."

Ron Pair Enters., Inc., 109 S. Ct. at 1031.

11 U.S.C. § 1141(b) and (c) provide:

> (b) *Except as otherwise provided in the plan or in the order confirming the plan*, the confirmation of a plan vests all of the property of the estate in the debtor.
>
> (c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of

> all claims and interests of creditors, equity security holders, and of general partners in the debtor.

11 U.S.C. § 1141 (emphasis added). The plain language of § 1141 provides that unless "otherwise provided in the plan or the order confirming the plan" property revests in the debtor upon confirmation. Notably, § 1141 does not state "[e]xcept as otherwise **expressly** provided in the plan or order confirming the plan" property revests in the debtor. Absent the statutory requirement that a plan contain express language preventing revesting of property in the debtor, normal principles of contract interpretation are to be applied to determine a plan's meaning. As the Ninth Circuit stated:

> A reorganization plan resembles a consent decree and therefore, should be construed basically as a contract. *See The Official Creditors Committee of Stratford of Texas, Inc. v. Stratford of Texas, Inc. (In re Stratford of Texas, Inc.)*, 635 F.2d 365, 368-69 (5th Cir. Unit A Jan. 1981); *see also Rufo v. Inmates of Suffolk County Jail*, __ U.S. __, __, 112 S. Ct. 748, 757, 116 L. Ed. 2d 867 (1992) (a consent decree has elements of both a judgment and a contract). Although a confirmed bankruptcy plan is a judgment rendered by a federal court in a case arising under federal law, because there is little need for a nationally uniform body of law regarding the interpretation of Chapter 11 plans and because state law is regularly incorporated into bankruptcy law, state law constitutes the federal rule of decision here and governs our interpretation of [the debtor's] plan. *See Kamen v. Kemper Financial Serv. Inc.*, __ U.S. __, __, 111 S. Ct. 1711, 1717, 114 L. Ed. 2d 152 (1991); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-29, 99 S. Ct. 1448, 1458-59, 59 L. Ed. 2d 711 (1979); *Stratford*, 635 F.2d at 368-39.

Hillis Motors, Inc. v. Hawaii Automobile Dealers' Ass'n, 997 F.2d 581, 588 (9th Cir. 1993).

Applying the foregoing, the court in *Hillis Motors* applied applicable state law, Hawaii law, that a "legal agreement should be construed as a whole and its meaning determined from the entire context and not from any one part, word, phrase, or clause." *Hillis Motors*, 997 F.2d at 588. Based upon these principles, the court held

that a plan does not need express provisions that prevent property from revesting in the debtor. Instead, a plan is to be interpreted as a whole and may prevent vesting in the debtor even if "[t]he plan does not state in unambiguous terms that the property of the estate does not revest in the debtor." *Hillis Motors, Inc.*, 997 F.2d at 589.

Thus, the plain language of § 1141 does not dictate that a plan contain express provisions preventing revesting. In the absence of this statutory requirement, a plan is to be construed as a contract whereby its meaning is to be determined from its entire context.

B. The Ninth Circuit Applied The Plain Meaning Of 11 U.S.C. § 1141 To The Provisions Of Smith's Plan.

The Ninth Circuit applied the plain meaning of 11 U.S.C. § 1141 to the provisions of Smith's plan, and analyzing the provisions of Smith's plan, the Ninth Circuit applied its previous holding in *Hillis Motors*. In *Hillis Motors*, the Ninth Circuit specifically addressed the issue of whether the debtor's plan provided that it would remain property of the debtor's estate after confirmation. The court acknowledged that confirmation customarily revests property of the estate in the debtor unless the plan otherwise provides. However, the court noted that because a plan's provisions are to be interpreted as a whole under state law, it may prevent vesting in the debtor even if "[t]he plan does not state in unambiguous terms that the property of the estate does not revest in the debtor." *Hillis Motors*, 997 F.2d at 589.

In reaching its determination, the court made the following observations and conclusions about the debtor's plan of reorganization:

> Hillis' first reorganization plan was atypical. The plan did not grant Hillis a discharge but specifically contemplated that any discharge of its debts would occur in the future. The plan did not return control of Hillis to the company's sole stockholder, D. Hillis; but it did not transfer the assets of the company to another entity either. Instead the trustee, as the representative of the bankruptcy court, retained management and control over Hillis' business. Hillis was not free to do what it pleased with its assets and property but rather the distribution of the company's profits was strictly controlled. Unusually, the reorganization plan also

> provided that the bankruptcy court would be involved in the administration of the estate after confirmation.
>
> In essence, Hillis' plan provided that the business would be conducted under court supervision via the trustee until all of Hillis' creditors were paid. While day-to-day business decisions were to be made by Rowley [Hillis' C.E.O], the corporation continued to operate under the aegis of the court and the oversight of the trustee. Rowley also contributed the investment capital to operate the business (for which he was to receive reimbursement) and he was granted compensation for his services. Nevertheless, Hillis' plan makes clear that the purpose of the continued operation of the business was to pay back the company's creditors under the supervision of the court. Only after the payment of all claims and expenses of the estate would Rowley be allowed to seek permission from the estate to obtain Hillis' automobile broker's license and operate the business as the new owner free and clear of judicial intervention. Although there was a confirmed plan, the reorganization process continued post-confirmation. Hillis was not free to deal with its property and the world as it would have been if it had not been subject to the jurisdiction of the bankruptcy court. *Cf.* [*Cunningham v.*] *Healthco,* [*Inc.*], 824 F.2d [1448] at 1460 [5th Cir. 1987].

Hillis Motors, 997 F.2d at 589 (footnote omitted). Thus, the debtor's confirmed plan provided that: 1) the management and control of the debtor business would remain in the trustee's hands; 2) a fixed percentage of the company's postconfirmation profits "were to be paid to the estate for disbursement as ordered by the bankruptcy court"; and 3) "[t]he bankruptcy court retained jurisdiction to insure that the purpose and intent of the plan were carried out." *Hillis Motors*, 997 F.2d at 587. Based upon its "analysis of the language, purposes, and context of Hillis' first reorganization plan," the court concluded that the debtor's corporate property remained part of the estate. *Hillis Motors*, 997 F.2d at 590.

Applying the analysis set forth in *Hillis Motors*,[1] the Ninth Circuit examined Smith's Plan, giving meaning to all its provisions,[2] and found *Daybreak* did not revest in Smith upon confirmation. Specifically, the court stated:

> Smith's reorganization plan provided that his creditors "will receive [payments] on account of their claim as soon as funds are available [from the sale of prints of Daybreak]. . . . If, sixty (60) months after confirmation, secured creditors have not been substantially paid, Debtor will make arrangements to sell or auction the painting *Daybreak*." Thus, *Daybreak* did not vest in Smith free and clear of all intervening interests upon confirmation. Instead, Smith's creditors retained a contingent interest in the painting.
>
> Moreover, as the district court pointed out, Smith's reorganization plan explicitly provides that the bankruptcy court "shall continue to retain exclusive jurisdiction over these proceedings until the provisions of the plan have been fully performed for the following purposes . . . (6) supervising the enforcement of the plan; and (7) for such other purposes as the court shall determine." In order to supervise the enforcement of the plan, the bankruptcy court had to have the authority to enforce its provisions. Thus, the bankruptcy court necessarily had jurisdiction over

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1. The Ninth Circuit was bound to follow the precedent set forth in *Hillis Motors* and applied its holding properly. *Fireman's Fund Ins. Co. v. M.V. DSR Atlantic*, 131 F.3d 1336, 1337 n.1 (9th Cir. 1998), *cert. denied*, __ U.S. __, 1998 WL 334029 (1998) (the Ninth Circuit is bound to follow Ninth Circuit precedent); *Landreth v. Internal Revenue Service*, 859 F.2d 643, 648 (9th Cir. 1988) ("we are not normally free to reconsider controlling Ninth Circuit precedent."); *United States v. Smith*, 628 F.2d 1260, 1261 (9th Cir. 1980) ("[w]e are bound to follow the precedent of this circuit.").

2. Nevada law follows the same principles for contract interpretation. A contract must be construed as a whole and "every word must be given effect if at all possible." *Royal Indemnity Co., Inc. v. Special Service Supply Co. Inc*, 82 Nev. 148, 149, 413 P.2d 500, 502 (Nev. 1966). *See also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63, 115 S. Ct. 1212, 1219 (1995) (a cardinal principle of contract construction is "that a document should be read to give effect to all its provisions and to render them consistent with each other.").

> Smith's assets to require him to distribute the funds from proceeds of the sale of prints of *Daybreak* or to force Smith to sell *Daybreak* if he was unable to repay his creditors. Therefore, Smith "was not free to deal with [his] property and the world as [he] would have been if [he] had not been subject to the jurisdiction of the bankruptcy court." *Id.* [Hillis Motors, 997 F.2d] at 589.

Pp. 5a-6a of Petition.

Thus, as demonstrated and determined by the Ninth Circuit, the provisions of Smith's plan provide that *Daybreak* did not revest in Smith. Therefore, the Ninth Circuit's holding, which is based upon the particular provisions of Smith's plan, does not provide a sufficient basis for this court to grant Smith's Petition.

1. *The Ninth Circuit Did Not Rely Solely Upon The Plan's Jurisdictional Provisions In Its Determination That Daybreak Remained Property Of The Estate Nor Did It Fail To Recognize 11 U.S.C. § 1141(c).*

Smith contends that:

> [T]he Ninth Circuit concluded that, in order for the Bankruptcy Court to retain jurisdiction necessary to enforce the plan, the assets of Smith's chapter 11 estate must not have fully revested in him upon confirmation.
>
> In holding that the Plan's jurisdictional provisions affected the revesting of the property in Smith's estate under Bankruptcy Code section 1141(b), the Ninth Circuit nonsensically equated jurisdiction with property of the estate. This holding conflicts with the plain statutory language governing bankruptcy court jurisdiction, as well as with the holdings of numerous other courts.

P. 14 of Petition. In addition, Smith alleges that:

> By holding that property of a chapter 11 estate does not revest in the reorganized debtor when creditors retain interests in that property, the Ninth Circuit ignores the relationship between section 1141(b), which governs

> revesting and section 1141(c), which governs encumbrances that remain on revested property postconfirmation.

P. 20 of Petition.

Smith is parsing the Ninth Circuit's holding to create a nonexistent conflict with case law and § 1141. The Ninth Circuit did not rely solely upon the Plan's jurisdictional provisions in its determination that *Daybreak* remained property of the estate, nor did it fail to recognize 11 U.S.C. § 1141(c). Instead, the Ninth Circuit analyzed Smith's Plan as a whole as required by principles of contract law.

Upon consideration of all Plan provisions, the Ninth Circuit noted as follows:

> Smith's reorganization plan provided that his creditors "will receive [payments] on account of their claim as soon as funds are available [from the sale of prints of Daybreak]. . . . If, sixty (60) months after confirmation, secured creditors have not been substantially paid, Debtor will make arrangements to sell or auction the painting *Daybreak*." Thus, *Daybreak* did not vest in Smith free and clear of all intervening interests upon confirmation. Instead, Smith's creditors retained a contingent interest in the painting.

In conjunction with these provisions, the Ninth Circuit considered the Plan's jurisdictional provisions and stated:

> *Moreover*, as the district court pointed out, Smith's reorganization plan explicitly provides that the bankruptcy court "shall continue to retain exclusive jurisdiction over these proceedings until the provisions of the plan have been fully performed for the following purposes. . . (6) supervising the enforcement of the plan; and (7) for such other purposes as the court shall determine."

P. 6a of Petition (emphasis added).

As a result of these provisions, the Ninth Circuit concluded:

> In order to supervise the enforcement of the plan, the bankruptcy court had to have the authority to enforce its provisions. Thus, the bankruptcy court necessarily had

> jurisdiction over Smith's assets to require him to distribute the funds from proceeds of the sale of prints of *Daybreak* or to force Smith to sell *Daybreak* if he was unable to repay his creditors. Therefore, Smith "was not free to deal with [his] property and the world as [he] would have been if [he] had not been subject to the jurisdiction of the bankruptcy court." *Id.* [*Hillis Motors*, 997 F.2d] at 589.

Pp. 5a-6a of Petition.

The Ninth Circuit's analysis demonstrates that it considered the provisions of the Plan as a whole. Based upon this analysis, the Ninth Circuit found that the provisions regarding payment to creditors from one source, *Daybreak*, in addition to the jurisdictional provisions, established that *Daybreak* did not revest in Smith. Thus, the Ninth Circuit did not base its determination solely upon the jurisdictional provisions of the Plan. Likewise, it did not base its determination solely upon its holding that Smith's creditors retained a contingent interest. Instead, it considered the totality of the provisions of the Plan as required.

In addition to the foregoing provisions, other provisions of Smith's plan demonstrate that Smith's property did not revest in him upon conversion. The plan provides:

> (e) *Additional Provisions Consented to by Debtor.* In addition to the foregoing, Debtor consents to the following provisions and consents to their inclusion in any order of the court, including the order of confirmation:
>
> . . .
>
> (2) that if the Debtor defaults in any terms of the Plan, the court upon hearing after notice to Debtor, the creditors and such other persons as the court may direct, may enter an order either adjudging the Debtor bankrupt or directing the bankruptcy be proceeded with pursuant to the provisions of the Bankruptcy Code, as amended, or dismissing the proceedings, whichever in the opinion of the court may be in the best interest of creditors, and the amount of all claims shall be reinstated in their allowed amount, crediting only payments received thereon.

Thus, upon default under the Plan, including the failure to substantially pay secured creditors within sixty months after confirmation, Smith's case could be converted to allow payment from *Daybreak*.

Accordingly, the Ninth Circuit properly based its decision upon the particular facts and provisions contained in Smith's Plan as a whole. As a result, the Ninth Circuit's holding did not erroneously interpret statutory authority or case law. Smith is merely attempting to mischaracterize and parse the Ninth Circuit's decision by arguing that it conflicts with § 1141(c) and with authority pertaining to jurisdiction to bootstrap his argument that the Ninth Circuit's decision conflicts with statutory authority and case law.

II.

EVEN IF THE NINTH CIRCUIT HAD NOT BASED ITS DECISION UPON THE SPECIFIC PROVISIONS OF SMITH'S PLAN, INTERPRETATION OF THE RELEVANT STATUTES DICTATES THAT SMITH'S PROPERTY VESTED IN THE CHAPTER 7 BANKRUPTCY ESTATE UPON CONVERSION OF HIS CHAPTER 11 CASE.

Smith contends that this Court should grant his petition because the Ninth Circuit failed to apply the majority view that postconfirmation conversion to chapter 7 does not result in the vesting of assets in the chapter 7 estate. Although the Ninth Circuit did not specifically address this issue because it decided the case upon the facts and provisions in the Plan, the Ninth Circuit did affirm the District Court which had held that upon conversion of a chapter 11 case to a chapter 7 case, the debtor's assets vest in the chapter 7 estate.

Although there may be a conflict among courts with regard to this issue, it is not of one of substantial importance. Resolution of Smith's contentions are resolved by application of the plain meaning of the following sections of the Bankruptcy Code, 11 U.S.C. §§ 348, 541, 1112, and 1141, and by policy considerations. However, resolution of these issues can be performed by including provisions in a plan of reorganization addressing the effect of conversion on a debtor's property. In addition, Congress can amend the statutory framework to resolve any confusion with regard to this issue.

A. The Plain Meaning Of 11 U.S.C. §§ 348, 541, 1112, And 1141 Dictates That Upon Conversion Of A Chapter 11 Case To A Chapter 7 Case The Debtor's Assets Vest In The Chapter 7 Estate.

1. *Analysis Of Statutory Framework.*

As previously stated, analysis of a statute begins with its plain meaning. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 110 S. Ct. 2126 (1990); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 112 S. Ct. 1146, 1149 (1992). The plain meaning is conclusive, "except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.' " *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 109 S. Ct. 1026, 1031 (1989). "In such cases, the intention of the drafters, rather than the strict language, controls." 109 S. Ct. at 1031.

Statutory analysis must begin with 11 U.S.C. § 1141(b). Section 1141(b) pertains to confirmation and provides "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." Thus, pursuant to § 1141(b), unless the plan or the order confirming the plan provides otherwise, upon confirmation a debtor is revested with property of the debtor's estate. However:

> The confirmation of a plan . . . does not necessarily dispose of the bankruptcy case. Instead, the case generally remains pending even after confirmation until the plan is substantially consummated and a final decree is entered. Therefore, it appears that the case continues even though all property of the estate has been vested in the reorganized debtor pursuant to Section 1141(b).

In re Calania Corp., 188 B.R. 41, 43 (Bankr. M.D. Fla. 1995). Thus, the "[t]he confirmation of a Chapter 11 plan does not automatically terminate the jurisdiction of the bankruptcy court." *Chase Manhattan Bank, N.A. v. Sultan Corp. (In re Sultan Corp.)*, 81 B.R. 599, 602 (9th Cir. BAP 1987). *See also, Goodman v. Phillip R. Curtis Enters., Inc.*, 809 F.2d 228, 232 (4th Cir. 1987) (Bankruptcy Code § 1142 "limits the authority of the court to matters concerning the implementation or execution of a confirmed plan."); *Blair v. Finan (In re Elless Co.)*, 174

F.2d 925, 929 (6th Cir. 1949), *cert. denied*, 338 U.S. 824, 70 S. Ct. 70 (1949) ("[i]n confirming a plan of reorganization, the court may only retain jurisdiction in order to protect its decree, to prevent interference with the execution of the plan, and to aid otherwise in its operation. . . ."); *Spiers Graff Spiers v. Menako (In re Spiers Graff Spiers)*, 190 B.R. 1001, 1007 (Bankr. N.D. Ill. 1996); *In re Cinderella Clothing Indus., Inc.*, 93 B.R. 373, 377 (Bankr. E.D. Pa. 1988).

11 U.S.C. § 1112 provides in relevant part:

> (b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee or bankruptcy administrator, and after notice and a hearing, *the bankruptcy court may convert a case under this chapter to a case under chapter 7 of this title* or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause including —
>
> . . . .
>
> . . . .
>
> (7) inability to effectuate substantial consummation of a confirmed plan;
>
> (8) material default by the debtor with respect to a confirmed plan;
>
> (9) termination of a plan by reason of the occurrence of a condition specified in the plan[.]

11 U.S.C. § 1112 (emphasis added). Section 1112(b), which pertains to conversion for a chapter 11 case to a chapter 7 case, clearly demonstrates that a bankruptcy court retains jurisdiction to convert or dismiss a case even though a plan has been confirmed. Thus, the plain language of § 1112(b) "clearly contemplates the conversion of a Chapter 11 case following confirmation of the chapter 11 plan." *In re Calania Corp.*, 188 B.R. at 43.

Section 348(a) sets forth the effect of conversion, providing:

> *Conversion* of a case from a case under one chapter of this title to a case under another chapter of this title constitutes

> an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, *does not effect a change in the date of* the filing of the petition, *the commencement of the case*, or the order for relief.

11 U.S.C. § 348 (emphasis added). Accordingly, under § 348(a) two postulates are created. First, conversion is an order for relief. Second, and more significantly, except as otherwise set forth in §§ 348(b) and (c) which are not applicable, conversion does not change the date of the filing of the commencement of the case. That is, this date does not change because of a conversion.

The phrase "commencement of the case" contained in § 348 is extremely significant. The date of the "commencement of the case" is used to determine what constitutes property of the debtor's bankruptcy estate. *See* 11 U.S.C. § 541(a). Specifically, § 541(a) defines "property of the estate" as follows:

> The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> > (1) Except as provided in subsections (b) and (c)(2) of this section, *all legal or equitable interests of the debtor in property as of the commencement of the case.*

11 U.S.C. § 541 (emphasis added). There is no language in § 1112(b) that redefines property of the estate or when it is determined. Thus, even after conversion, the estate consists of property of the debtor determined as of the commencement of the case. *Calania*, 188 B.R. at 42.

> It would therefore appear from the combined operation of Section 541 and Section 348 that the conversion of a case does not affect the scope of the property of the estate in the converted case, since that property had been fixed as of the date of the original filing.

Calania, 188 B.R. at 42-43.

Therefore, the plain language of § 1141(b), § 1112, § 348, and § 541(a) demonstrates that Congress intended that (1) a confirmed chapter 11 case could be converted to a case under chapter 7, and (2) in that event, the property of the estate would include the property that the debtor held as of the commencement of the case; that is, on the date he or she filed the petition for bankruptcy relief. These statutes expressly provide that, even though a debtor converts his case to another chapter under the Bankruptcy Code, the conversion does not change the date of the commencement of the case. And, the date of the commencement of the case serves as the date as for which the property of the estate is determined.

Although upon confirmation of a chapter 11 plan property of the bankruptcy estate vests in a debtor (absent plan provisions that provide otherwise), § 348 which governs the effect of conversion is controlling under the fundamental tenet of statutory construction that a specific statute governs over a general statute.

> [A] court should not construe a general statute to eviscerate a statute of specific effect. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S. Ct. 2031, 2037, 119 L. Ed. 2d 157 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."); *Franklin v United States*, 992 F.2d 1492, 1502 (10th Cir. 1993) ("[A] specific statute . . . should not be deemed controlled or nullified by a general statute . . . absent a definite contrary intention."); 2A Norman J. Singer, *Sutherland Statutory Construction*, § 46.05, at 105 (5th ed. 1992) ("Where there is inescapable conflict between general and specific terms or provisions of a statute, the specific will prevail.").

State Bank of Southern Utah v. Gledhill (In re Gledhill), 76 F.3d 1070, 1078 (10th Cir. 1996). The express language of § 348(a) is specific. It pertains exclusively to the effect of conversion and thus governs over § 1141(b). Although § 348 may be characterized as a procedural statute as opposed to a substantive statute, it dictates the effect that conversion has on a debtor, a debtor's rights, creditors, and a creditor's rights.

Moreover, there are no contradictory provisions under the Code that dictate a different analysis. Section 1141(b) contains no language

which specifically applies in the event of conversion or contradicts § 348. And, in fact, other Code provisions bolster this analysis. Sections 1112(b)(7) and (8) provide for the conversion of a case even after confirmation of a plan for "cause."

However, despite § 1112(b)(7) or (8), under Smith's analysis a confirmed plan would never be converted because the property held by a reorganized debtor pursuant to the plan could never become available to creditors in the event of conversion. A debtor would still hold his pre-petition assets and the trustee would hold title to nothing. Thus, any conversion under the statute would be worthless to creditors and would allow a debtor to intentionally default on his plan of reorganization without losing his assets upon conversion. *Smith v. John Peter Lee, Ltd. (In re Smith)*, 201 B.R. 267, 273 (D. Nev. 1996). Certainly, this could not be the result intended by the drafters of § 1112(b). As the court noted in *Calania*:

> [I]t would be utterly pointless to make a provision for the conversion of an aborted Chapter 11 case to a Chapter 7 case if by virtue of Section 1141 there would not be any assets for the Chapter 7 trustee to administer. A careful analysis of the Code provisions permits only one conclusion that properties which were subject to the confirmed plan that is properties in which the Debtor had a cognizable legal or equitable ownership interest on the date of confirmation will be properties of the estate in a Chapter 7 case, but properties which are clearly acquired by the Debtor post-confirmation will not be subject to administration by the Chapter 7 trustee.

Calania, 188 B.R. at 43.

Another case on point is *In re NTG Indus., Inc.*, 118 B.R. 606 (Bankr. N.D. Ill. 1990). *NTG* involved a post-confirmation conversion of a chapter 11 case to chapter 7. Under the confirmed plan, certain preference actions were given to the creditors' committee for prosecution and collection with the proceeds to be divided among the unsecured creditors. The court recognized that upon confirmation, the estate ceased to exist. *NTG Indus., Inc.*, 118 B.R. at 610. However, the Court found that upon conversion, the rights held by the reorganized debtor "passed to the Trustee under the broad umbrella of section 541(a)(1) or section

541(a)(6), as proceeds of or from property of the estate." *NTG Indus., Inc.*, 118 B.R. at 610. The court stated:

> Someone has to complete the administration of the preference proceeds and possibly pursue additional preference actions. Furthermore, someone may need to pursue additional preference actions under sections 544 and 548 which neither the Committee, T&Z [the Committee's counsel] nor the Debtor have brought to date.
>
> . . . . The Trustee succeeds to the remaining property of the estate upon conversion, subject to existing unavoidable liens, encumbrances and claims against it.

NTG Indus., Inc., 118 B.R. at 612.

Nonetheless, despite the plain language of the applicable statutes, courts have reached contrary conclusions. *See Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458 (6th Cir. 1991); *In re K&M Printing, Inc.*, 210 B.R. 583 (Bankr. D. Ariz. 1997); *In re Winom Tool & Die, Inc.*, 173 B.R. 613 (Bankr. E.D. Mich. 1994); *In re T.S.P. Indus., Inc.*, 117 B.R. 375 (Bankr. N.D. Ill. 1990). *T.S.P.* supports Smith's argument that a debtor's property does not become part of a new chapter 7 estate. In *T.S.P.*, the debtor's chapter 11 plan had been confirmed. The U.S. Trustee moved to convert or dismiss the case because of the reorganized debtor's failure to make payments required by the plan. Rather than converting the debtor's case, the court dismissed it because it had found that the chapter 7 trustee would not have any assets to distribute to the creditors. *TSP Indus., Inc.*, 117 B.R. at 379. Specifically, the court stated that "the conversion of this case to a case under chapter 7 would not create a new estate or convert property of the Debtor into property of the estate." *TSP Indus., Inc.*, 117 B.R. at 378.

In reaching this conclusion, the court in *T.S.P.* failed to analyze the plain language of all the applicable sections of the Bankruptcy Code. Instead, the court based its decision primarily upon § 1141(b). The *T.S.P.* court did not consider the plain language of § 541 and § 348 which specifically pertain to the effect of conversion and property of the estate. The court's failure to consider § 541 and § 348 is demonstrated by its illogical statement that it could cite

circumstances where conversion of a chapter 11 case would be in the best interests of creditors and therefore would be warranted. *See T.S.P. Indus., Inc.*, 117 B.R. at 379. For instance, the court stated that there may be no "significant" assets in the estate except for a potential preference or fraudulent conveyance action which occurred prior to the commencement of the case. Under these circumstances, the case should be converted because "the chapter 7 trustee could exercise his or her powers to recover property that, under 11 U.S.C. § 541(a)(3), would become property of the estate for the benefit of creditors." *T.S.P. Indus., Inc.*, 117 B.R. at 379. Thus, the *T.S.P.* court's reasoning is faulty and contradictory. It used the date of commencement of the case to determine property of the estate despite the fact that it did not use this date to determine that physical property owned on that date became property of the estate upon conversion.

Thus, it is obvious that the court in *T.S.P.* arbitrarily applied statutory language and did not follow the dictates of the Supreme Court requiring that the plain meaning of the language of a statute be considered for statutory interpretation. Therefore, the holding in *T.S.P.* is not persuasive.

The other cases cited by Smith are likewise unpersuasive because these courts failed to apply the rules for statutory analysis to each of the statutes that are applicable.

2. *Policy Considerations.*

Policy concerns underlying the Bankruptcy Code also support the foregoing statutory analysis. If a bankruptcy court did not have the authority to convert a chapter 11 case and hold that the debtor's property vested in a chapter 7 estate, "[a] debtor could . . . materially default or lose all ability to effectuate a plan and creditors would be entirely without remedy." *Smith*, 201 B.R. at 274. As courts have stated, when a debtor's attempt at reorganization proves to be

> [U]navailing "no reason of policy suggests itself why the creditors should not be put back in precisely the same position as they would have been had the debtor never sought to repay his debts. . . ."

Cf. Bobroff v. Continental Bank (In re Bobroff), 766 F.2d 797, 803 (3d Cir. 1985) (involving a chapter 13 case; quoting *In re Hannan*, 24 B.R.

691, 692 (Bankr. E.D.N.Y. 1982)). Or as stated in the *NTG Indus., Inc.* case, "someone" has to administer the assets when the reorganized debtor has failed to execute its plan. *NTG Indus., Inc.*, 118 B.R. at 612.

If a creditor whose rights have been established under a confirmed plan cannot convert the chapter 11 case and pursue a debtor's assets in bankruptcy court, a creditor is forced to start all over and pursue its rights in state court. As a result, a creditor is not restored to the position it would have been in if a debtor would have never sought to repay his debts. Instead, a creditor who has established its rights under the bankruptcy court's jurisdiction must now protect its rights again and enforce these rights in state court, a court unlike the bankruptcy court, which is not familiar with the history and negotiations between the parties. Consequently, a creditor is left chasing the debtor in state court, expending additional time and money, pursuing a claim that in likelihood has been compromised under the debtor's plan. This is a result which is often not economically worthwhile and will, therefore, not be pursued.

The Bankruptcy Code was not drafted to allow for such a result. The Code was drafted to offer honest debtors a "fresh start." It was not drafted to allow debtors the opportunity to drag creditors through protracted, expensive court proceedings in the federal and state court systems. Accordingly, policy reasons underlying the Code also support the statutory analysis that a bankruptcy court has jurisdiction to convert a chapter 11 case in which there is a confirmed plan of reorganization and to vest the legal and equitable interests of the debtor as of the commencement of the case in a chapter 7 trustee.

B. The Issue Of Whether Upon Conversion Of A Chapter 11 Case To A Chapter 7 Case A Debtor's Property Becomes Property of the Chapter 7 Estate Is Not Of Substantial Importance To Warrant Granting Smith's Petition.

1. *Any Confusion About The Effects Of Conversion Can Be Resolved Pursuant To A Plan's Provisions.*

Any confusion about the effect of conversion can be resolved pursuant to the provisions of the plan of reorganization. That is, a plan can be drafted to include provisions pertaining to the effect of confirmation upon property of the debtor and the effect of conversion upon property of the estate.

As previously stated, 11 U.S.C. § 1141 provides that as "except as set forth in the plan or in the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."

> The effect of confirmation under the plain language of § 1141(a) is to bind all parties to the terms of the plan. It binds not only creditors but debtors as well. In essence, a confirmed plan is a binding contract and is res judicata as to all issues decided. *Stoll v. Gottlieb*, 305 U.S. 165, 59 S. Ct. 134, 83 L. Ed. 104 (1938); *Paul v. Monts*, 906 F.2d 1468 (10th Cir. 1990) (holding that confirmation of a Chapter 11 plan creates a binding contract which may be enforced in state court). This is true even if the plan is not consummated and the Chapter 11 is converted to Chapter 7. *See In re Blanton Smith Corp.*, 81 B.R. 440 (Bankr. M.D. Tenn. 1987). Once a plan is confirmed, neither a debtor nor a creditor may assert rights that are inconsistent with its provisions. *In re Riverside Nursing Home*, 137 B.R. 134 (Bankr. S.D.N.Y. 1992). *See also Republic Supply Company v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987); *In re Stratford of Texas, Inc.*, 635 F.2d 365 (5th Cir. 1981); *In re Dooley*, 116 B.R. 573 (Bankr. S.D. Ohio 1990); *In re Moussa*, 95 B.R. 449 (Bankr. N.D. Tex. 1989); *In re Astroglass Boat Co., Inc.*, 32 B.R. 538 (Bankr. M.D. Tenn. 1983).

In a thorough discussion of the binding effect of a confirmed plan, the Court in *In re Blanton Smith Corp., supra* stated:

> > [T]he Supreme Court [has] determined that the order confirming a plan of reorganization is *res judicata*. *Stoll v. Gottlieb*, 305 U.S. 165, 59 S. Ct. 134, 83 L. Ed. 104 (1938), *reh den'd*, 305 U.S. 675, 59 S. Ct. 250, 83 L. Ed. 437 (1938). In subsequent decisions, the courts of other circuits, relying on *Stoll*, have held a confirmation order to be equivalent to a judgment. In *Miller v. Meinhard-Commercial Corporations*, 462 F.2d 358, 360 (5th Cir. 1972), the Fifth Circuit stated:

> An arrangement confirmed by a bankruptcy court has the effect of a judgment rendered by a district court, and any attempt by the parties or those in privity with them to relitigate any of the matters that were raised or could have been raised therein is barred under the doctrine of *res judicata*. (Citations omitted).

81 B.R. at 442.

The binding effect of a confirmed plan extends to provisions that are later determined to be inconsistent with bankruptcy law. As the court stated in *Republic Supply Company v. Shoaf, supra*:

> Regardless of whether that provision is inconsistent with the bankruptcy laws or within the authority of the bankruptcy court, it is nonetheless included in the Plan, which was confirmed by the bankruptcy court without objection and was not appealed.

815 F.2d at 1050.

Johnson v. Laing (In re Laing), 146 B.R. 482, 484-85 (Bankr. N.D. Okla. 1992) (footnote omitted; emphasis added), *aff'd*, 31 F.3d 1050 (10th Cir. 1994).

Thus, a plan can provide provisions that relate to the effect of conversion and its effect on the debtor's property, and the debtor and creditors will be bound by these provisions. This is true regardless of whether or not such provisions are inconsistent with other provisions of the Bankruptcy Code such as 11 U.S.C. § 541. In this case, the Plan provided that upon Smith's default in consummating the Plan, the Court could "adjudge" Smith "bankrupt" and order the case "proceeded with pursuant to the provisions of the Bankruptcy Code."

Accordingly, § 1141 already provides a remedy for any possible confusion arising from the effect of conversion upon a confirmed chapter 11 case to a case under chapter 7 of the Bankruptcy Code. As a result, the conflict among courts with regard to this issue does not create an issue of importance necessary to warrant granting Smith's petition.

2. *Congress Can Resolve Any Confusion By Amending The Applicable Statutes.*

Because the statutory scheme drafted by Congress is so complex, Congress is the appropriate body to resolve the conflict among courts with regard to the issue of whether upon conversion of a confirmed chapter 11 case to a chapter 7 case the debtor's property becomes property of the chapter 7 estate. In fact, Congress resolved similar confusion and clarified contradictory case law pertaining to conversion under Chapter 13. Specifically, Congress amended 11 U.S.C. § 348 and added subsection (f).[3] Section 348(f) provides:

> (f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title —
>
> > (A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion; and
> >
> > (B) valuations of property and of allowed secured claims in the chapter 13 case shall apply in the converted case, with allowed secured claims reduced to the extent that they have been paid in accordance with the chapter 13 plan.
>
> (2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property in the converted case shall consist of the property of the estate as of the date of conversion.

Thus, if a chapter 13 reorganization case is converted to any other chapter, property of the estate includes all property belonging to the debtor as of the date of the filing of the petition that the debtor still possesses.

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3. The legislative history provides that "[t]his amendment would clarify the Code to resolve a split in the case of law about what property is in the bankruptcy estate when a debtor converts from chapter 13 to chapter 7." 140 Cong. Rec. H 10,770 (October 4, 1994). Thus, § 348(f) does not serve to *change* existing law pertaining to conversion, but merely serves to *clarify* existing law.

As Congress stated:

> This amendment would clarify the Code to resolve a split in the case of law about what property is in the bankruptcy estate when a debtor converts from chapter 13 to chapter 7. The problem arises because in chapter 13 (and chapter 12), any property acquired after the petition becomes property of the estate, at least until confirmation of a plan. Some courts have held that if the case is converted, all of this after-acquired property becomes part of the estate in the converted chapter 7 case, even though the statutory provisions making it property of the estate does not apply to chapter 7. Other courts have held that the property of the estate in a converted case is the property the debtor had when the original chapter 13 petition was filed.
>
> These latter courts have noted that to hold otherwise would create a serious disincentive to chapter 13 filings. For example, a debtor who had $10,000 equity in a home at the beginning of the case, in a State with a $10,000 homestead exemption, would have to be counseled concerning the risk that after he or she paid off a $10,000 second mortgage in the chapter 13 case, creating $10,000 in equity, there would be a risk that the home could be lost if the case were converted to chapter 7 (which can occur involuntarily). If all of the debtor's property at the time of conversion is property of the chapter 7 estate, the trustee would sell the home, to realize the $10,000 for the unsecured creditor and the debtor would lose the home.
>
> This amendment overrules the holding in cases such as *Matter of Lybrook*, 951 F.2d 136 (7th Cir. 1991) and adopts the reasoning of *In re Bobroff*, 766 F.2d 797 (3d Cir. 1985). However, it also gives the court discretion, in a case in which the debtor has abused the right to convert and converted in bad faith, to order that all property held at the time of conversion shall constitute property of the estate in the converted case.

140 Cong. Rec. H 10,770 (October 4, 1994).

This statutory amendment is significant in that, although under § 1327(b)(2) property of the debtor revests in the debtor upon

confirmation unless otherwise provided,[4] Congress drafted this statute to include property that the debtor had a legal or equitable interest in on the date of the filing of the petition. Therefore, although this statute does not pertain to chapter 11, it demonstrates the process that Congress intends to be undertaken when there is a conversion. That is, upon conversion, property of the estate includes all interests of the debtor that existed as of the date of commencement of the petition that the debtor retained as of the date of conversion. In addition, in drafting this statute, Congress recognized the need to create a provision to deal with a debtor's bad faith.

CONCLUSION

The Ninth Circuit based its decision upon the particular provisions of Smith's Plan and applicable law. Its determination is not contrary to the plain language of the Bankruptcy Code and decisions interpreting the Code. Thus, because the Ninth Circuit based its decision upon the particular provisions of Smith's Plan, this Court should deny granting Smith's petition.

Furthermore, to the extent that the Ninth Circuit improperly interpreted the provisions of Smith's Plan, the plain language of the Bankruptcy Code dictates that upon conversion of a confirmed chapter 11 case to a case under chapter 7, property of the debtor becomes property of the chapter 7 estate.

Respectfully submitted,

N. Patrick Flanagan
Counsel of Record
Lenard E. Schwartzer
HALE LANE PEEK DENNISON
HOWARD AND ANDERSON
Attorneys for Respondent
Tom Grimmett, Trustee
2300 West Sahara
Suite 800
Las Vegas, Nevada 89102
(702) 362-5118

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4. Under chapter 13, property also revests upon confirmation. 11 U.S.C. § 1327(b).

(4)

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No. 98-542

In The

Supreme Court of the United States

October Term, 1998

DARREL D. SMITH,

Petitioner,

v.

JOHN PETER LEE, LTD., TOM GRIMMETT, Chapter 7 Trustee,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

K. JOHN SHAFFER*
STUTMAN, TREISTER & GLATT
PROFESSIONAL CORPORATION
3699 Wilshire Boulevard, Suite 900
Los Angeles, California 90010
(213) 251-5100

RICHARD MCKNIGHT
DAVID MINCIN
MCKNIGHT & HENDRIX, P.C.
330 South Third Street, Suite 900
Las Vegas, Nevada 89101
(702) 388-7185

Counsel for Petitioner
* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF

Petitioner Darrel D. Smith hereby replies to the briefs in opposition to certiorari filed by Respondents John Peter Lee, Ltd. and Tom Grimmett. Neither Respondent has refuted the basis upon which Smith seeks this Court's review – the Ninth Circuit's perpetuation of significant conflicts regarding two important issues of bankruptcy law: (i) whether Bankruptcy Code section 1141(b) permits a plan of reorganization to limit the revesting of assets in the reorganized debtor by implication, instead of by express language, and (ii) whether the conversion of a chapter 11 case to a chapter 7 liquidation can divest the reorganized debtor of assets that had revested in him upon confirmation of his plan of reorganization. At least with respect to the second issue, Respondent Grimmett *concedes* that a conflict with the Sixth Circuit and other courts does exist. Grimmett at 19.

Instead of addressing the issues raised in the Petition and in the decisions below, Respondents argue irrelevant factual points and meaningless distinctions between the cases. They also downplay the significance of "[t]he enormous confusion" in the case law that has led the courts to "mindboggling" results in this important area of bankruptcy law. *See* 4 *Norton Bankruptcy Law & Practice* § 95:12 at Supp. 172-73 (1998) (hereinafter "*Norton*").

A. The Ninth Circuit's Holding That The Estate's Assets Did Not Revest In Smith Was Central To That Court's Decision, And Its Resolution Of The Issue Directly Conflicts With The Holdings Of Other Courts.

The Ninth Circuit's opinion centers principally on whether Smith's assets revested in him upon confirmation of his Plan[1] under Bankruptcy Code section 1141(b). *See* Petition at 4a-6a. Although no provision in Smith's Plan limited the revesting of his assets, the Ninth Circuit held that a

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[1] Capitalized terms have the same meaning as in the Petition.

limitation on revesting could be *implied* from various unrelated Plan provisions. According to the Ninth Circuit, "[a] plan may prevent such vesting even if '[t]he plan does not state in unambiguous terms that property of the estate does not revest in the debtor.' " *See* Petition at 5a (quoting the Ninth Circuit's prior decision in *In re Hillis Motors, Inc.*, 997 F.2d 581, 589 (9th Cir. 1993)).

As demonstrated in the Petition, the Ninth Circuit's holding directly conflicts with the majority rule that assets in the debtor's bankruptcy estate "vest[ ] automatically upon plan confirmation" absent specific contrary provisions in the plan, *Harstad v. First American Bank*, 39 F.3d 898, 902 (8th Cir. 1994), and that a plan must "explicitly state" that it is limiting the revesting of assets in the debtor, *Prince v. Clare*, 67 B.R. 270, 272 (N.D. Ill. 1986).[2] These holdings are consistent with "the usual rule of statutory construction that an exception which carves out something which would otherwise be included must be strictly construed." *United States v. J.E. Mamiye & Sons, Inc.*, 665 F.2d 336, 340 (C.C.P.A. 1981).

Neither Respondent attempts to refute the conflict among the courts as to the proper interpretation of section 1141 and the law of revesting. Instead, Lee mischaracterizes the revesting issue as "irrelevant," and even goes so far as to include in his list of supposedly "inapplicable" authorities the Ninth Circuit's decision in *Hillis*, *supra*, the *sole* substantive precedent cited anywhere in that court's opinion below. Lee at 11.

Lee's contention is preposterous, given that the revesting issue was at the heart of the Ninth Circuit's decision. By holding that Smith's assets did not revest upon confirmation, the Ninth Circuit thereby believed it was able to dismiss the majority line of cases holding that a Bankruptcy Court may not convert a chapter 11 case to one under chapter 7 once the

---

[2] *See also In re Pauling Auto Supply*, 158 B.R. 789, 795 (Bankr. N.D. Iowa 1993) ("Absent an express provision postponing the revesting, the court will not imply it from vague and ambiguous provisions of the plan."); *In re Grinstead*, 75 B.R. 2, 3 (Bankr. D. Minn. 1985) ("Once a plan of reorganization is confirmed, the bankruptcy estate ceases to exist unless the plan specifically provides otherwise. . . . ").

estate's assets have revested in the reorganized debtor. If the assets had in fact vested in Smith, as the Bankruptcy Court had found, then Smith's case could not have been converted under the majority rule. *See* Petition at 21-23.

Lee's manner of "distinguishing" cases is equally unpersuasive. In case after case, Lee identifies some irrelevant fact that has nothing to do with the application of the revesting provisions in Bankruptcy Code section 1141(b). For example, Lee terms as "inapplicable" the Eighth Circuit's decision in *Harstad*, *supra*, for the stated reason that it "was not a conversion case." This is a distinction without a difference. The significance of *Harstad* is not for the law of conversion, but rather for its holding that a court may not infer a limitation on section 1141(b) revesting from a plan's jurisdictional provisions. The Eighth Circuit's holding squarely rejects the reasoning employed by the Ninth Circuit in this case. Thus, *Harstad* is no less relevant because it did not involve a post-confirmation conversion than because it did not involve a debtor named "Smith."

Unlike Lee, Grimmett does not pretend that the revesting issue was not highly relevant to the Ninth Circuit's decision. Rather, he contends that the Ninth Circuit's decision was correct because it followed that court's prior decision in *Hillis*, the "plain language" Bankruptcy Code section 1141, and state law rules of contract interpretation. Each of Grimmett's contentions is unpersuasive.

First, the fact that the Ninth Circuit may have followed its *own* published authority supports granting the Petition. The Ninth Circuit's holding in *Hillis* created a conflict regarding the proper interpretation of section 1141(b), and the decision below has perpetuated that conflict by following *Hillis*.

Second, Grimmett's "plain language" argument is no more persuasive. According to Grimmett, the Ninth Circuit was able to imply a limitation upon the revesting of Smith's assets because section 1141(b) provides that property revests in the reorganized debtor "[e]xcept as otherwise provided in the plan." Grimmett at 6. Grimmett contends that Congress could have made (but did not make) the exception to section

1141(b) more restrictive by providing that property revests "[e]xcept as otherwise **expressly** provided in the plan or the order confirming the plan." *Id.* at 6 (emphasis in original). What Grimmett ignores, however, is that Congress just as easily could have made (but did not make) the exception to section 1141(b) broader by providing that property revests "[e]xcept as otherwise **implicitly** provided in the plan . . . ," which is the reading that the Ninth Circuit adopted in the decision below. The fact is that Congress included *neither* the term "expressly" nor the term "implicitly" in the statute. Unlike the Ninth Circuit, however, a majority of courts have made clear that only specific language in a plan can prevent the revesting of estate assets in the debtor. Petition at 13.

Finally, Grimmett erroneously contends that the question whether Smith's assets revested in him is a matter of state law contract interpretation. Grimmett at 6, 9. To the contrary, what is at issue here is the proper interpretation of a federal statute, which is clearly a matter of federal law. *Molzof v. United States*, 502 U.S. 301, 305 (1992) ("the meaning of . . . a federal statute is a federal question"). The Ninth Circuit's interpretation of section 1141(b), which allows a court to imply a limitation on revesting from ambiguous plan terms, directly conflicts with established rules of statutory interpretation, *see J.E. Mamiye & Sons*, 665 F.2d at 340, and with those cases which have interpreted section 1141(b) to revest estate property in the reorganized debtor upon confirmation unless the plan expressly provides otherwise, *see* Petition at 13-14.

B. Respondents Fail To Refute The Existence Of A Significant Conflict In The Law Of Post-Confirmation Conversion.

Respondent Grimmett *admits* that the decisions below conflict with holdings of the Sixth Circuit and various lower courts. *See* Grimmett at 19 (recognizing that "courts have reached contrary conclusions" and citing, *inter alia*, *In re Chattanooga Wholesale Antiques, Inc.*, 930 F.2d 458 (6th Cir.

1991)).[3] In fact, these "contrary conclusions" represent the *majority* rule. While Grimmett attempts to mischaracterize the majority rule as "illogical," *id.* at 19, he cannot escape the fact that the decision of the courts below directly conflicts with this rule. This Court should grant certiorari in order to resolve this direct conflict among the federal courts.

Given that there is no escaping the clear conflict, Grimmett attempts to diminish the importance of the issues presented in this case, claiming that they are "not of substantial importance." Grimmett at 21. Well respected commentators strongly disagree. *See* Petition at 25-26. As explained by *Norton*, "[t]he failure of the Bankruptcy Code to deal effectively with post confirmation default has led to increasing confusion in the case law," "various reactions by the courts," "mindboggling" results, and "unintended consequences" for creditors and debtors alike. *Norton* § 95:12 Supp. at 172-73.

According to Grimmett, parties can simply draft around the conflict by expressly providing for what happens in the event of a post-confirmation conversion to chapter 7. Grimmett at 21-23. Grimmett's argument proves too much, in that such an argument could be applied to *any* provision of the Bankruptcy Code governing plans of reorganization. Yet, as this Court is aware, plans of reorganization often are not confirmed with the consent of all parties. *See Bank of America N.A. & S.A. v. 203 North LaSalle Street Partnership*, 126 F.3d 955 (7th Cir. 1997), *cert. granted*, 118 S. Ct. 1674 (1998) (this Court to decide confirmability of contested "new value" plan). Thus, it is simply not true that the parties to a bankruptcy case will always be able to agree upon plan provisions that deal with every possible dispute that may

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[3] Contrary to Grimmett, who acknowledges the conflict between the decisions below and the Sixth Circuit's decision in *Chattanooga Wholesale*, Lee contends that no such conflict exists. Lee at 9. Lee is incorrect. Lee quotes out of context the final paragraphs of *Chattanooga Wholesale* that deal with transfers which occurred *prior* to confirmation and, thus, prior to the revesting of the estate's assets in the reorganized debtor. Contrary to Lee's assertion, there was no "asset belonging to the converted Chapter 7 estate." *Id.*

arise, or that the parties could even think of every possible dispute, or that it would make sense for the parties to attempt to draft a plan in such a manner. In this case, Smith did not intend for, and would not have agreed to, any provision that would have allowed those assets which had revested in him upon confirmation to be transferred to a new, chapter 7 estate upon conversion of his case.

Similarly unavailing is Grimmett's contention that this Court should allow Congress to resolve the conflict among the Circuits. Grimmett at 24. Under this logic, this Court should *never* grant certiorari in a bankruptcy case (or in any other case involving federal statutes), since the Court can always wait for Congress to amend the statute to deal with the problem.[4]

The fact is that Congress *did* amend the Bankruptcy Code in 1994 to provide the result that Grimmett seeks, *but only in chapter 13 bankruptcy cases*. Pursuant to a 1994 amendment to Bankruptcy Code section 348(f), when a *chapter 13* case is converted to a chapter 7 case, the assets of the newly created chapter 7 estate consist of all property in the debtor's control at the time of conversion, whether or not those assets had revested in the debtor upon confirmation of the chapter 13 plan. No such provision exists for conversion of chapter 11 cases. *See Norton* § 95:12 Supp. at 174 ("the language of § 348 so clearly fails to address post confirmation conversion" of chapter 11 cases). Since Congress could have, but did not, provide that postconfirmation conversion of chapter 11 cases vests the reorganized debtor's assets in a new chapter 7 estate, the majority line of cases properly holds that Congress

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[4] The Court's recent consideration of the continued vitality of the "new value principle" in *LaSalle Street Partnership* should put this notion to rest. This Court has recognized the significant conflict among the Circuits regarding the new value principle not once, but twice before. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 205 (1988); *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). Notwithstanding the passage of a decade, Congress failed to act to resolve this obvious conflict. This Court should not accept Grimmett's request to ignore a clear conflict in the hopes that Congress someday might address it.

did not intend for such a result in chapter 11 cases. *See Bates v. United States*, 118 S. Ct. 285, 290 (1997) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.") (quotations omitted).

C. The Majority Rule That A Chapter 11 Case May Not Be Converted After Property Has Revested In The Reorganized Debtor Does Not Render Bankruptcy Code Section 1112 Meaningless.

Both Lee and Grimmett contend that, were the Ninth Circuit to have applied the majority rule, it "would make a nullity of 11 U.S.C. § 1112(b)(7) and (8)." Lee at 6; Grimmett at 18. This precise argument has been considered and rejected multiple times by courts adhering to the majority rule. *See, e.g., In re K & M Printing, Inc.*, 210 B.R. 583, 585 (Bankr. D. Ariz. 1997) ("The notion that section 1112(b) is rendered meaningless under the [majority] view is incorrect."); *In re Winom Tool & Die, Inc.*, 173 B.R. 613, 621 (Bankr. E.D. Mich. 1994) ("I therefore reject the trustee's assertion that certain Code provisions or bankruptcy rules would be rendered meaningless if conversion did not divest the debtor of property interests acquired pursuant to § 1141(b)."); *In re T.S.P. Indus.*, 117 B.R. 375, 379 (Bankr. N.D. Ill. 1990) (rejecting argument that majority rule "would render Sections 1112(b)(7) and (8) nullities").

While the ordinary rule under section 1141(b) is that all estate property revests in the reorganized debtor upon confirmation, plans can and do sometimes contain express language preventing the revesting of certain assets. These plans, which differ from the Plan that Smith confirmed, ordinarily would allow for the post-confirmation conversion of a case to chapter 7. This is because, in such cases, there would be assets available to become part of the chapter 7 estate. *See Winom Tool & Die*, 173 B.R. at 621 ("to the extent that the

plan or confirmation order so provides, property of the chapter 11 estate does not vest in the debtor – and hence would become a part of the chapter 7 estate if the case converts").

In this case, property in Smith's chapter 11 estate did revest in him upon confirmation, and there was "no provision [in the Plan] directing that upon conversion, the Court retains jurisdiction over debtor's property." *K & M Printing*, 210 B.R. at 586. Respondents point to language in the Plan providing that, upon default, the Bankruptcy Court could "adjudg[e] the Debtor bankrupt." Petition at 40a. However, neither that language nor any other provision of the Plan authorized the Bankruptcy Court to convert the case and divest Smith of assets which revested in him upon confirmation. Notwithstanding the fact that there were no assets available to become a part of the chapter 7 estate, the courts below failed to follow the majority rule that conversion was not appropriate because it would not be in the best interests of creditors and the estate.

D. The Facts Of This Case Are Not "Unusual."

Grimmett and Lee both attempt to mischaracterize the Ninth Circuit's decision as being based "upon the particular facts in the case." Grimmett at 4. In particular, they stress the Bankruptcy Court's findings that Smith was in default of his obligations under the Plan. It is not the lower courts' fact finding, however, that is at issue here; clearly this Court will not grant certiorari to sort out differing interpretations of the record. Rather, the basis for certiorari in this case is the clear conflict among the courts perpetuated by the holdings below that the revesting provisions of Bankruptcy Code section 1141(b) can be overridden by implication, rather than by specific language in a plan, and that assets which have revested in the reorganized debtor can vest again in the chapter 7 trustee.

There is nothing unique about the factual or procedural posture of this case. The substantial issues of law discussed in the Petition may arise any time that a bankruptcy court finds that a debtor was either unable to substantially consummate

its plan, or was in material default in its obligations under the plan. The myriad case law on the issue illustrates this point. The certworthy issue is whether, assuming those findings to be true, a bankruptcy court may convert a debtor's chapter 11 case to one under chapter 7 when all of the estate's assets have revested in the reorganized debtor. The majority rule is that a court may not convert such a case, as Grimmett admits. Because the courts below held to the contrary, this Court should grant certiorari in order to resolve the "enormous confusion" in this important area of bankruptcy law. *See Norton* § 95:12 at Supp. 172-73.

E. Section 1142 Does Not Provide An Alternative Basis For Affirming The Ninth Circuit's Decision.

Lee contends that the Ninth Circuit could have relied on Bankruptcy Code section 1142 as an alternative basis for its decision. The Ninth Circuit, however, did not even cite section 1142, because nothing in section 1142 authorized the appointment of a trustee and the wholesale divestiture of Smith's revested assets. Section 1142 merely authorizes a bankruptcy court to enter orders that are "necessary for the consummation of the plan" or "to effect a transfer of property dealt with by a confirmed plan." Thus, section 1142 is a tool courts may use to facilitate a plan's implementation. In this case, however, the Plan is *not* being implemented. Rather, the Plan has been usurped entirely by the appointment of a chapter 7 trustee who has distributed Smith's assets without any regard to the terms of the confirmed Plan.

F. This Appeal Is Not Moot.

Lee has argued at every stage of this appeal that this appeal is moot. Lee has failed to prove his point every time. The test of mootness on appeal is whether the appellate court can grant at least some relief to the appellant. *In re Envirodyne Indus.*, 29 F.3d 301, 304 (7th Cir. 1994). Contrary to Lee's assertion, the test is not whether Smith can "guarantee that all of the transactions can be reversed." Lee at 18.

Among other things, Lee acknowledges that the chapter 7 trustee remains in control of more than $300,000 in cash, which cash properly belongs to Smith. A reversal of the Ninth Circuit's decision would return both those funds and control of this case to Smith, thus enabling Smith to deal effectively with the tax and other problems the improper conversion has caused him. Moreover, reversal also would enable Smith to challenge many of the trustee's actions in this case, including the trustee's improper disposition of Smith's assets in contravention of his rights as a revested debtor. Finally, reversal would facilitate Smith's challenge to the substantial fees incurred by the trustee and his professionals. Thus, whether or not Smith is able to challenge the sale of *Daybreak* itself, he will be able to reassert control over his own assets and to avoid further harm due to the substantial delay and expense of the chapter 7 proceedings.

* * *

Smith respectfully requests that this Court grant the Petition.

Respectfully submitted,

K. JOHN SHAFFER*
STUTMAN, TREISTER & GLATT
PROFESSIONAL CORPORATION
3699 Wilshire Boulevard, Suite 900
Los Angeles, California 90010
(213) 251-5100

RICHARD MCKNIGHT
DAVID MINCIN
MCKNIGHT & HENDRIX, P.C.
330 South Third Street, Suite 900
Las Vegas, Nevada 89101
(702) 388-7185

Counsel for Petitioner
** Counsel of Record*